RECORD
AND
BRIEFS

No. 15-5238

IN THE
SUPREME COURT OF THE UNITED STATES

LESTER RAY NICHOLS,
Petitioner,

vs.

UNITED STATES OF AMERICA,
Respondent.

Supreme Court, U.S.
FILED
JUL 14 2015
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ORIG

MOTION FOR LEAVE TO PROCEED IN FORMA PAUPERIS

Now comes the Petitioner, Lester Ray Nichols, by his undersigned federal public defender, and pursuant to 18 U.S.C. § 3006A and Rule 39.1 of this Court, respectfully requests leave to proceed in forma pauperis before this Court, and to file the attached Petition For Writ Of Certiorari to the United States Court of Appeals for the Tenth Circuit without prepayment of filing fees and costs.

In support of this motion, Petitioner states that he is indigent, that he was found indigent by both the district court and the Tenth Circuit, and that he was represented by Assistant Federal Public Defender Timothy Henry, pursuant to 18 U.S.C. § 3006A, in the lower courts. Petitioner was sentenced to a term of imprisonment in the United States Bureau of Prisons. He is currently serving the term of supervised release also imposed in this case.

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Date: July 14, 2015

No. 15-5238

IN THE
SUPREME COURT OF THE UNITED STATES

LESTER RAY NICHOLS,
Petitioner,

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UNITED STATES OF AMERICA,
Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

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ORIGINAL

QUESTIONS PRESENTED

Two men lived on opposite sides of the Missouri River in the Kansas City Metropolitan area, one in Missouri within the Eighth Circuit, the other in Kansas within the Tenth Circuit. Both men were convicted of sex offenses before the enactment of the Sex Offender Registration and Notification Act ("SORNA"), but were required to register under SORNA. Both men traveled from their homes to the Kansas City International Airport, flew to the same foreign country to reside, and thereafter did not update their registrations in the jurisdictions they had left. On these facts, the Eighth Circuit ruled in *United States v. Lunsford*, 725 F.3d 859 (8th Cir. 2013), that the failure to update a registration does not violate SORNA. The Tenth Circuit came to the opposite conclusion in Petitioner's case, on the basis of its earlier decision in *United States v. Murphy*, 664 F.3d 798 (10th Cir. 2011).

This case presents the following questions:

I. Whether 42 U.S.C. § 16913(a) requires a sex offender who resides in a foreign country to update his registration in the jurisdiction where he formerly resided, a question that divides the courts of appeals?

II. Whether 42 U.S.C. § 16913(d) is an unconstitutional delegation of legislative authority to the Executive Branch because it grants the Attorney General unguided discretion to determine who to prosecute for violations of SORNA, a question that caused disagreement within the Tenth Circuit below?

TABLE OF CONTENTS

QUESTIONS PRESENTED i

TABLE OF AUTHORITIES CITED iv
- Cases iv
- Statutes v
- Other vi

PETITION FOR WRIT OF CERTIORARI 1

OPINIONS BELOW 1

JURISDICTION 1

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED 1

STATEMENT OF THE CASE 2
- A. Statutory Background 4
- B. Factual Background 7
- C. Proceedings in the District Court 8
- D. Proceedings in the Court of Appeals 9

REASONS FOR GRANTING THE WRIT 12

I. The Courts of Appeals are Split Over Whether SORNA Applies to Sex Offenders Who Move to Foreign Jurisdictions 12

A. There Is An Entrenched Conflict Within The Circuits On SORNA's Application To Offenders Who Move To Foreign Jurisdictions 12

B. Resolution Of This Question Is Critically Important To The Viability Of SORNAs Registration System 15

C. The Tenth Circuit Erred In Holding That Sex Offenders Who Move To Foreign Jurisdictions Must Update Registrations In Former Jurisdictions 18

1. By its plain terms, a sex offender need only register where he "resides," not where he "resided." 19

2. Other related provisions confirm that an offender must register, and update a registration, where he "resides," not where he "resided." 20

3. SORNA's purpose confirms that offenders who move to a foreign country need not register or update a registration. 23

4. If nothing else, the rule of lenity requires that this Court interpret SORNA in Mr. Nichols's favor. 24

D. This Case Is An Excellent Vehicle For Resolving The Circuit Split. 24

II. This Court Should Resolve Whether And Under What Standard Congress Can Constitutionally Delegate Its Legislative Authority To The Attorney General To Define The Scope Of A Criminal Law 25

A. This Court Should Resolve Whether Greater Specificity Is Required When Congress Delegates Its Legislative Authority To Define The Reach Of A Criminal Statute To Another Branch Of Government. 27

B. The Tenth Circuit Erred When It Held That Congress's Delegation To The Attorney General In § 16913(d) Is Constitutional. 30

C. This Case Is An Excellent Vehicle For Deciding This Exceptionally Important Question. 32

CONCLUSION 32

INDEX TO APPENDIX

Appendix A: Decision of the Tenth Circuit 1

Appendix B: District Court Order denying Motion to Dismiss 16

Appendix C: Decision of the Tenth Circuit Denying Rehearing En Banc 25

Appendix D: 42 U.S.C. § 16911 50

Appendix E: 42 U.S.C. § 16913 55

Appendix F: 28 C.F.R. § 72.3 57

TABLE OF AUTHORITIES CITED

PAGE

Cases

American Power & Light Co. v. SEC, 329 U.S. 90 (1946) 27

Carr v. United States, 560 U.S. 438 (2010) ..... passim

Dean v. United States, 556 U.S. 568 (2009) 19

DOT v. Ass'n of Am. Railroads, 135 S.Ct. 1225 (2015) 27

Ex Parte United States, 287 U S. 241 (1932) 26

Fahey v. Mallonee, 332 U.S. 245 (1947) 29

INS v. Chadha, 462 U.S. 919 (1983) 26

J.W. Hampton, Jr., & Co. v. United States, 276 U.S. 394 (1928) 27

Liparota v. United States, 471 U.S. 419 (1985) 24

Loving v. United States, 517 U.S. 748 (1996) 26

Mistretta v. United States, 488 U.S. 361 (1989) 26, 27, 28

Panama Refining Co. v. Ryan, 293 U.S. 388 (1935) 30

Reynolds v. United States, 132 S.Ct. 975 (2012) 9, 30, 31, 32

Riley v. St. Luke's Episcopal Hosp., 252 F.3d 749 (5th Cir. 2001) 26

Schechter Poultry Corp. v. United States, 295 U.S. 495 (1935) 30

Touby v. United States, 500 U.S. 160 (1991) 10, 28, 29

United States v. Cooper, 750 F.3d 263 (3d Cir.), *cert. denied*, 135 S.Ct. 209 (2014) ... 10

United States v. Evans, 333 U.S. 483 (1948) 26

United States v. George, 228 U.S. 14 (1913) 31

United States v. Goodwin, 717 F.3d 511 (7th Cir. 2013) 28

United States v. Hinckley, 550 F.3d 926 (10th Cir. 2008) 31

United States v. Lanier, 520 U.S. 259 (1997) 17

United States v. Lewis, 768 F.3d 1086 (10th Cir. 2014) 13

United States v. Lunsford, 725 F.3d 859 (8th Cir. 2013) ..... passim

United States v. Murphy, 664 F.3d 798 (10th Cir. 2011) ..... passim

Whitman v. United States, 135 S. Ct. 352 (2015) 24

Statutes

18 U.S.C. § 2250(a) ..... passim

18 U.S.C. § 2423 7

18 U.S.C. § 3231 1

28 U.S.C. § 1254(1) 1

28 U.S.C. § 1291 1

42 U.S.C. § 16901 ..... passim

42 U.S.C. § 16911 2

42 U.S.C. § 16911(10) 6, 12, 19, 21

42 U.S.C. § 16911(13) 5, 19

42 U.S.C. § 16911(5) 5

42 U.S.C. § 16913 ..... 2, 3, 12

42 U.S.C. § 16913(a) ..... passim

42 U.S.C. § 16913(b)(1) 5

42 U.S.C. § 16913(b)(2) 5

42 U.S.C. § 16913(c) 5, 21, 22

42 U.S.C. § 16913(d) ..... passim

42 U.S.C. § 16914(a) 5

42 U.S.C. § 16928 ..... 2, 6, 22

Other Authorities

28 C.F.R. § 72.3 ..... 2, 7

Adam Walsh Child Protection and Safety Act, Pub. L. No. 109-248, Tit. 1, 120 Stat. 587 (2006) 4

Departments of Commerce, Justice, and State, the Judiciary, and Related Agencies Appropriations Act of 1998, Pub. L. No. 105-119, 111 Stat. 2440 (1997) 5

Pam Lyncher Sexual Offender Tracking and Identification Act of 1996, Pub. L. No. 104-236, 110 Stat. 3093 (1996) 4

The National Guidelines for Sex Offender Registration and Notification, 72 Fed. Reg. 30,210-01 (May 30, 2007) 7

The National Guidelines for Sex Offender Registration and Notification, 73 Fed. Reg. 38,030-01 (July 2, 2008) 3, 6, 7, 23

Wetterling Crimes Against Children and Sexually Violent Offender Registration Act, Pub. L. No. 103-322, 108 Stat. 1796 (1994) 4

PETITION FOR WRIT OF CERTIORARI

Petitioner Lester Ray Nichols respectfully petitions for a writ of certiorari to review the judgement of the United States Court of Appeals for the Tenth Circuit.

OPINIONS BELOW

The panel decision of the United States Court of Appeals for the Tenth Circuit is published at 775 F.3d 1225 (10th Cir. 2014), and is included as Appendix A. The decision denying rehearing en banc, including dissents from the denial, is published at 784 F.3d 666 (10th Cir. 2015), and is included as Appendix C. The unpublished order of the district court, denying Mr. Nichols's motion to dismiss the indictment, is included as Appendix B.

JURISDICTION

The United States District Court for the District of Kansas originally had jurisdiction pursuant to 18 U.S.C. § 3231, which provides exclusive jurisdiction for offenses against the United States. Mr. Nichols timely appealed his conviction to the United States Court of Appeals for the Tenth Circuit pursuant to 28 U.S.C. § 1291. The Tenth Circuit affirmed the conviction and, on April 15, 2015, denied Mr. Nichols's petition for rehearing en banc. Mr. Nichols seeks review in this Court of the Tenth Circuit's judgment and order. This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Article I, Section 1, Clause 1 of the United States Constitution provides:

> "All legislative Powers herein granted shall be vested in a Congress of the United States, which shall consist of a Senate and House of Representatives."

18 U.S.C. § 2250(a) provides:

> (a) In general.—Whoever—
>
> (1) is required to register under the Sex Offender Registration and Notification Act;
>
> (2)(A) is a sex offender as defined for the purposes of the Sex Offender Registration and Notification Act by reason of a conviction under Federal law (including the Uniform Code of Military Justice), the law of the District of Columbia, Indian tribal law, or the law of any territory or possession of the United States; or
>
> (B) travels in interstate or foreign commerce, or enters or leaves, or resides in, Indian country; and
>
> (3) knowingly fails to register or update a registration as required by the Sex Offender Registration and Notification Act;
>
> shall be fined under this title or imprisoned not more than 10 years, or both.

42 U.S.C. § 16911 (full text included as Appendix D)

42 U.S.C. § 16913 (full text included as Appendix E)

42 U.S.C. § 16928**Error! Bookmark not defined.** provides:

> The Attorney General, in consultation with the Secretary of State and the Secretary of Homeland Security, shall establish and maintain a system for informing the relevant jurisdictions about persons entering the United States who are required to register under this subchapter. The Secretary of State and the Secretary of Homeland Security shall provide such information and carry out such functions as the Attorney General may direct in the operation of the system.

28 C.F.R. § 72.3 (full text included as Appendix F)

STATEMENT OF THE CASE

Congress enacted the Sex Offender Registration and Notification Act ("SORNA") to bring uniformity to the varied state sex offender registries. At present, this goal of

uniformity is unfulfilled in light of differing interpretations of the term "resides" in 42 U.S.C. § 16913 by the Eighth and Tenth Circuits. In jurisdictions within the Eighth Circuit, offenders who move to foreign jurisdictions have no obligation to update their registrations in former jurisdictions. In jurisdictions within the Tenth Circuit, in contrast, offenders who move to foreign jurisdictions are expected to update their registrations in the jurisdiction in which they formerly resided. In jurisdictions other than the Eighth and Tenth Circuits, it is unclear whether offenders who move to foreign jurisdictions must register with the former jurisdiction. Simply put, confusion on this issue is widespread. The conflict is entrenched, and the issue is of exceptional importance to the viability of a uniform national sex offender registry.

Moreover, a fundamental constitutional issue lurks in this case. In 42 U.S.C. § 16913(d), Congress delegated to the Attorney General the authority to apply SORNA to offenders convicted before the enactment of SORNA (pre-Act offenders). Ultimately, the Attorney General issued a regulation specifying that SORNA applies to all pre-Act offenders. The National Guidelines for Sex Offender Registration and Notification, 73 Fed. Reg. 38,030-01, 38,063 (July 2, 2008). Because it is a crime for a sex offender to fail to register, *see* 18 U.S.C. § 2250(a), in light of the Attorney General's decision to apply SORNA retroactively, if a pre-Act offender fails to register or update his registration under SORNA, he has violated § 2250(a).

The constitutionality of this delegation is an issue of extreme importance. It is one thing for Congress to delegate regulatory functions to the Executive Branch. It is

quite another for Congress to delegate the reach of a criminal statute to the Executive Branch. After all, it is the Executive Branch that enforces a criminal statute. Delegating the decision on who to prosecute to the prosecuting authority obliterates the separation of powers inherent in our constitutional system.

A. Statutory Background

In 2006, Congress enacted the Adam Walsh Child Protection and Safety Act ("the Adam Walsh Act"), Pub. L. No. 109-248, Tit. 1, 120 Stat. 587 (2006), with the intent to establish a national registration system for sex offenders. 42 U.S.C. § 16901, *et seq.* SORNA, Congress's most recent Congressional effort to "set national standards for state sex-offender registration programs," comprises a significant portion of the Adam Walsh Act. *See* 42 U.S.C. §§ 16911 16929.

Before SORNA's enactment, federal law focused not on a national registration system, but on state sex offender registries. The original legislation, the Wetterling Crimes Against Children and Sexually Violent Offender Registration Act ("Wetterling Act"), Pub. L. No. 103-322, 108 Stat. 1796, 2038 (1994), required certain offenders to register their addresses with a designated state law-enforcement agency upon release from prison. *Id.* at 2038-2041. Two years later, after every state had created a registry, Congress amended the Wetterling Act to establish a comprehensive national sex offender registry at the FBI. Pam Lyncher Sexual Offender Tracking and Identification Act of 1996, Pub. L. No. 104-236, 110 Stat. 3093 (1996) (codified as amended at 42 U.S.C. § 14072). The following year, Congress again amended the Wetterling Act to require states to participate in the national registry

by providing information on sex offenders to the FBI. Departments of Commerce, Justice, and State, the Judiciary, and Related Agencies Appropriations Act of 1998, Pub. L. No. 105-119, 111 Stat. 2440, 2461-2467 (1997) (codified at 42 U.S.C. §§ 14071 14072).

Ultimately, believing that "the patchwork of standards that had resulted from piecemeal amendments [to the Wetterling Act] should be replaced with a comprehensive new set of standards," Congress passed SORNA. 120 Stat. 587-601 (codified at 18 U.S.C. § 2250 and 42 U.S.C. § 16901 *et seq.*). SORNA created a new, national sex offender registry, expanded the definition of "sex offense," 42 U.S.C. § 16911(5), and added to the information states must collect about offenders. 42 U.S.C. § 16914(a). Under SORNA, a sex offender must register either "before completing a sentence of imprisonment with respect to the offense giving rise to the registration requirement" or "not later than 3 business days after being sentenced for that offense, if the sex offender is not sentenced to a term of imprisonment." 42 U.S.C. § 16913(b)(1), (2). The offender must also update the registration "in person" "not later than 3 business days *after* each change of" name, residence, employer, or student status. 42 U.S.C. § 16913(c) (emphasis added).

The registration requirements provide that "[a] sex offender shall register, and keep the registration current, in each jurisdiction where the offender *resides*, where the offender *is* an employee, and where the offender *is* a student." 42 U.S.C. § 16913(a) (emphases added). "Resides" is defined as "the location of the individual's home or other place where the individual habitually *lives*." 42 U.S.C. § 16911(13) (emphasis

added). The National Guidelines for Sex Offender Registration and Notification ("National Guidelines") define "habitually lives" as a period of "30 days." 73 Fed. Reg. 38,030-01, 38,061. "Jurisdiction" is limited to federal lands (a state, the District of Columbia, etc.), and does not include foreign countries. 42 U.S.C. § 16911(10).

For sex offenders entering the United States from a foreign country, Congress ordered the Attorney General to "establish and maintain a system for informing the relevant jurisdictions about [such] persons." 42 U.S.C. § 16928. For sex offenders departing the United States to live in a foreign country, the National Guidelines recognize that the offender "may pass beyond the reach of U.S. jurisdictions and hence may not be subject to any enforceable registration requirement under U.S. law unless and until he or she returns to the United States." 73 Fed. Reg. 38,030-01, 38,066. Notably, no statute or regulation requires a sex offender to inform a relevant jurisdiction that he is leaving the United States.

Congress further made it a felony for any person who is required to register under SORNA, and who then travels in interstate or foreign commerce, to knowingly fail to register or update a registration. 18 U.S.C. § 2250(a). Violation of this provision is punishable by up to ten years' imprisonment. *Id.* Importantly, Congress granted the Attorney General "authority to specify the applicability of the [registration] requirements . . . to sex offenders convicted before the enactment of this chapter . . . ." 42 U.S.C. § 16913(d). Aside from the general statement of purpose found in the Adam Walsh Act, however, Congress provided no further guidance, substantive or otherwise, for how the Attorney General ought to exercise that authority. *Id.*

On February 28, 2007, the Attorney General promulgated an interim regulation under the authority granted him by § 16913(d), specifying that the requirements of SORNA applied to all pre-Act sex offenders. 28 C.F.R. § 72.3. On May 30, 2007, the Attorney General made the interim regulation permanent by issuing proposed guidelines. The National Guidelines for Sex Offender Registration and Notification, 72 Fed. Reg. 30,210-01 (May 30, 2007). After revising the guidelines in response to public comment, the Attorney General issued final guidelines, which state that "SORNA applies to all sex offenders, including those convicted of their registration offenses prior to the enactment of SORNA or prior to particular jurisdictions' incorporations of the SORNA requirements into their programs." 73 Fed. Reg. 38,030-01, 38,063. As a result of these regulations, all individuals who qualify as sex offenders must register under SORNA, and the failure to do so is a criminal offense, 18 U.S.C. § 2250(a), regardless of whether or not the defendant committed the underlying sex offense prior to SORNA's passage.

B. Factual Background

In 2003, prior to SORNA's enactment, Lester Nichols was convicted of a sex offense under 18 U.S.C. § 2423. App. 2. He served a term of imprisonment and was released from prison in March 2012. While on supervised release, Mr. Nichols registered as a sex offender in Kansas and updated that registration every three months, including in October 2012. *Id.* 16. In November 2012, Mr. Nichols moved from Kansas to the Philippines. He abandoned his home in Leavenworth, traveled approximately fifteen minutes across the Missouri River to the Kansas City

(Missouri) International Airport, and flew to the Philippines. *Id.* 3, 17. In December 2012, Mr. Nichols was arrested in the Philippines, deported to California, and transported to Kansas to face the charge at issue here. *Id.*

C. Proceedings in the District Court

In June 2013, a federal grand jury in Kansas returned a one-count indictment against Mr. Nichols, charging him with failure to update his sex-offender registration in November 2012, in violation of 18 U.S.C. § 2250(a). App. 16. In October 2013, Mr. Nichols moved to dismiss the indictment on two grounds: (1) SORNA did not require him to register as a sex offender in the Philippines or to update his Kansas registration after he moved to the Philippines; and (2) Congress violated the nondelegation doctrine when it gave unconstrained discretion to the Attorney General to decide whether SORNA applies to pre-Act offenders. App. 17-20.

On the first ground, Mr. Nichols acknowledged contrary authority – *United States v. Murphy*, 664 F.3d 798 (10th Cir. 2011) – but set forth a number of reasons why *Murphy* was wrongly decided. App. 17-19. Mr. Nichols explained, *inter alia*, that: (1) a foreign country, like the Philippines, is not a "jurisdiction" covered by SORNA; and (2) SORNA requires registration where an offender "resides," not where an offender "resided." From the use of present tense verbs, and in light of Congress's intent not to extend SORNA's reach to foreign countries, Mr. Nichols asserted that, upon his relocation to the Philippines, he had no obligation to update his sex offender registration in Kansas (where his former residence was located). *Id.* Mr. Nichols noted that his position was adopted by the Eighth Circuit in *United States v. Lunsford*, 725

F.3d 859 (8th Cir. 2013), and that it was also consistent with this Court's decision in *Carr v. United States*, 560 U.S. 438 (2010).

On the second ground, Mr. Nichols asserted that Congress provided no "intelligible principle" to guide the Attorney General's discretion in determining whether SORNA should apply to pre-Act offenders. In support, he cited Justice Scalia's dissent in *Reynolds v. United States*, 132 S.Ct. 975, 986 (2012) (noting that an interpretation of SORNA to encompass pre-Act offenders "seems to me sailing close to the wind with regard to the principle that legislative powers are nondelegable") (joined by Justice Ginsburg).

The district court denied Mr. Nichols's motion. App. 24. On the first issue, the district court found itself bound by the Tenth Circuit's decision in *Murphy*. *Id.* 3, 19. On the second issue, the district court refused to credit Mr. Nichols's position because of contrary authority. *Id.* 20-23. The district court found insignificant the statement made by Justice Scalia in dissent in *Reynolds*, 132 S.Ct. at 986. *Id.* 23.

Thereafter, Mr. Nichols entered into a conditional guilty plea, preserving the right to appeal the denial of his motion to dismiss. App. 4.

D. Proceedings in the Court of Appeals

On appeal, the Tenth Circuit affirmed Mr. Nichols's conviction in a published decision. App. 1-15. On the first issue, the panel found itself bound by *Murphy*. App. 6-8. It concluded: "By boarding a plane to the Philippines, Mr. Nichols abandoned his residence in Kansas – a 'jurisdiction involved.' This change in residence triggered a registry obligation in Kansas, which Mr. Nichols did not fulfill." App. 8-9. The panel

decision acknowledged the three sources relied on by Mr. Nichols – (1) Judge Lucero's dissent in *Murphy*; (2) the Eighth Circuit's decision in *Lunsford*; and (3) this Court's decision in *Carr* – but declined to consider the merits of the arguments in light of controlling contrary authority (*Murphy*). App. 7-8.

In a short concurrence, Judge McKay disagreed with *Murphy*, agreed with Judge Lucero's dissent in *Murphy* and the Eighth Circuit's decision in *Lunsford*, and urged the full Court to consider the issue. App. 15.

On the second issue, the Court of Appeals rejected Mr. Nichols's assertion that it should apply the heightened "meaningfully constrains" standard suggested by this Court in *Touby v. United States*, 500 U.S. 160, 165 (1991). App. 9, 12-13. With no analysis whatsoever, the Court of Appeals rejected this heightened standard because the Third Circuit recently rejected it. App. 12-13 (citing *United States v. Cooper*, 750 F.3d 263, 272 (3d Cir.), *cert. denied*, 135 S.Ct. 209 (2014)). Applying the "intelligible principle" standard, the Court held that Congress "clearly delineated the general policy upon which SORNA is based," "clearly delineated . . . the Attorney General as the executive official to whom it delegated authority under SORNA," and "clearly delineated the boundaries of the authority it delegated to the Attorney General." App. 10-11.

By a vote of 8 to 4,[1] the Tenth Circuit, in a published order, declined to rehear the case en banc. App. 25. Judges Lucero and Gorsuch authored separate dissents.

Judge Lucero, echoing his dissent in *Murphy*, opined that rehearing en banc was

[1] Judge McKay, as a senior judge, did not participate in the en banc proceedings. App. 25.

necessary to address the circuit split between the Eighth and Tenth Circuits on the applicability of SORNA's registration requirements to offenders who move to a foreign country. App. 27. "Correcting this circuit split is a matter of exceptional importance given the express purpose of Congress in enacting SORNA to remedy 'a wide disparity among State registration requirements and notification obligations for sex offenders.'" *Id.* Judge Lucero explained that the conflict in the circuits creates the very type of disparity SORNA was meant to eliminate, thus thwarting congressional intent and needlessly complicating an already complicated law. *Id.*

Judge Gorsuch agreed. App. 29 ("A circuit split lingers here."). He urged this Court to review the decision in this case:

> In denying rehearing today to reconsider this court's position in light of *Lunsford*'s teaching, we leave those who seek a resolution of the circuit split to travel other avenues. *Murphy* and *Lunsford* articulate both sides of the split admirably and there's no need for further amplification here, only resolution somewhere.

Id.

Judge Gorsuch also wrote extensively on why Congress's delegation to the Attorney General to decide whether SORNA applies to hundreds of thousands of pre-Act offenders violates the nondelegation doctrine. App. 29-49. His basic point: "If the separation of powers means anything, it must mean that the prosecutor isn't allowed to define the crimes he gets to enforce." *Id.* 29. Judge Gorsuch also called into question the use of the "intelligible principle" standard in the context of criminal statutes, instead suggesting that a "stricter rule would apply." *Id.* 39-42. In the end, in Judge Gorsuch's view, because Congress provided no guidance whatsoever to the Attorney General on whether SORNA should reach pre-Act offenders, the delegation was

unconstitutional. *Id.* 42-49.[2]

This timely petition follows.

REASONS FOR GRANTING THE WRIT

I. The Courts Of Appeals Are Split Over Whether SORNA Applies to Sex Offenders Who Move To Foreign Jurisdictions.

An established conflict exists between the Eighth and Tenth Circuits over the meaning of the term "resides" in 42 U.S.C. § 16913. This conflict creates a disparate application of SORNA, which was enacted to promote uniformity, in the thirteen states within the Eighth and Tenth Circuits, and also creates uncertainty in the other thirty-seven states and federal territories as to whether SORNA applies to offenders who move to foreign jurisdictions. This Court should resolve this conflict.

A. There Is An Entrenched Conflict Within The Circuits On SORNA's Application To Offenders Who Move To Foreign Jurisdictions.

A sex offender is required to "register, and keep the registration current, in each jurisdiction where the offender resides, where the offender is an employee, and where the offender is a student." 42 U.S.C. § 16913(a). Foreign countries, like the Philippines, are not "jurisdictions" within SORNA's reach. 42 U.S.C. § 16911(10). As Judge Lucero explained, an "Eighth Circuit decision creates a circuit split [with the Tenth Circuit] regarding the applicability of SORNA's notice provisions to offenders who leave the country." App. 27.

In 2011, in *Murphy*, the Tenth Circuit held that a sex offender who abandons his residence and moves to a foreign jurisdiction must still register in the abandoned

---

[2] Judge Lucero agreed with Judge Gorsuch on these points and would have addressed this issue en banc as well. App. 28.

jurisdiction. 664 F.3d at 799. Judge Lucero dissented in *Murphy*, explaining, *inter alia*, that the plain language of the statutory provisions requires registration where an offender "resides," not where an offender "resided." *Id.* at 805-06. In his view, a sex offender who moves to a foreign jurisdiction has no obligation to update a registration in the jurisdiction abandoned by the sex offender. *Id.*

In 2013, in *Lunsford*, the Eighth Circuit, consistent with Judge Lucero's dissent in *Murphy*, held that a sex offender who abandons his residence and moves to a foreign jurisdiction is not required to register in the abandoned jurisdiction. 725 F.3d at 862. In doing so, the Eight Circuit cited this Court's decision in *Carr* for the proposition that a verb in the present tense, like "resides," "generally does not include the past." *Id.* at 861. The Eighth Circuit "respectfully disagree[d]" with the Tenth Circuit's decision in *Murphy*:

> But insofar as *Murphy* concluded that an offender who leaves a domestic jurisdiction for a foreign jurisdiction necessarily must update his registration in the domestic jurisdiction where he formerly resided, we respectfully disagree. According to the statute, a jurisdiction is a "jurisdiction involved" only if the offender resides, works, or studies there "after [a] change of . . . residence."

Id. at 862. Without a doubt, *Lunsford* is in direct conflict with *Murphy*.

In this case, a panel of the Tenth Circuit found itself bound by *Murphy*. App. 8. In doing so, the panel noted the Eighth Circuit's decision in *Lunsford*, but refused to address it on the merits. App. 8. The panel also refused to reconsider *Murphy* in light of this Court's decision in *Carr*, noting that a later Tenth Circuit decision held that *Carr* did "not dictate an alternative conclusion' to the conclusion reached in *Murphy*." App. 8 (quoting *United States v. Lewis*, 768 F.3d 1086, 1091 n.4 (10th Cir. 2014)).

In a short concurrence, Judge McKay wrote "separately to express disagreement with the majority in *Murphy*, agreement with the dissent in *Murphy* by Judge Lucero, and [his] belief that consideration of this case by the full en banc court would be appropriate." App. 16. Judge McKay further noted his agreement with the Eighth Circuit's decision in *Lunsford*. *Id.*

Despite the conflict with the Eighth Circuit, and despite the conflict within the Tenth Circuit itself, the Tenth Circuit declined to rehear the instant case en banc. App. 25. Of the twelve active judges, four voted to rehear the case en banc (Judges Lucero, Gorsuch, Matheson, and Moritz). In dissent, Judge Lucero expressed his continued "view that *Murphy* was incorrectly decided." App. 27. "Correcting this circuit split is a matter of exceptional importance given the express purpose of Congress in enacting SORNA to remedy 'a wide disparity among State registration requirements and notification obligations for sex offenders." *Id.* In a separate dissent, Judge Gorsuch urged resolution of this conflict as well:

> In denying rehearing today to reconsider this court's position in light of *Lunsford*'s learning, we leave those who seek a resolution of the circuit split to travel other avenues. *Murphy* and *Lunsford* articulate both sides of the split admirably and there's no need for further amplification here, only resolution somewhere.

Id. 29.

With the Tenth Circuit's denial of Mr. Nichols's petition for rehearing en banc, the conflict in the circuits on this issue is firmly entrenched. The Eighth Circuit believes that the Tenth Circuit is wrong. *Lunsford*, 725 F.3d at 862. The Tenth Circuit has refused to reconsider its position despite the Eighth Circuit's contrary decision in

Lunsford. App. 8, 25. Both courts adhere firmly to their positions, and it is clear that neither intends to alter course. To reiterate the words of Judge Gorsuch below: "*Murphy* and *Lunsford* articulate both sides of the split admirably and there's no need for further amplification here, only resolution somewhere." App. 29. That somewhere is this Court, as only this Court can resolve this conflict. Only this Court can bring uniformity to a law intended to do just that. For this reason, this Court should grant this petition and resolve the conflict that exists in the lower courts.

B. Resolution Of This Question Is Critically Important To The Viability Of SORNA's Registration System.

Congress enacted SORNA to establish "a comprehensive national system for the registration of" sex offenders. 42 U.S.C. § 16901. As Judge Lucero rightly concluded below, "[c]orrecting this circuit split is a matter of exceptional importance given the express purpose of Congress in enacting SORNA to remedy 'a wide disparity among State registration requirements and notification obligations for sex offenders.'" App. 27.

Resolving whether a sex offender who moves to a foreign jurisdiction must still update a registration in a former jurisdiction is essential to Congress's goal of establishing a uniform, comprehensive national sex offender registry. At present, a sex offender who lives on the Missouri side of State Line Road, for instance, is under no obligation to update his registration in Missouri if he abandons his home, boards a plane, flies to the Philippines, and establishes a residence there. *Lunsford*, 725 F.3d at 862. Yet a sex offender directly across the street, on the Kansas side of State Line Road, must update his registration in Kansas if he abandons his home, boards a

plane, flies to the Philippines, and establishes a residence there. App. 8-9. This type of disparate treatment of identical conduct is precisely what SORNA is designed to eliminate. 42 U.S.C. § 16901. Because of the conflict at issue in this case, Congress's goal of a national sex offender registry has failed.

Judge Lucero made an analogous point in dissent below, focusing starkly on the disparate treatment of offenders based on something as arbitrary as geographical location:

> The facts of *Lunsford* and this case illustrate why our current jurisprudence runs directly against the stated intent of Congress. In both cases, the appellants moved directly from the Kansas City metropolitan area to the Philippines. Lunsford had lived in the Missouri side of the metropolis and was not required to update his Missouri registration to reflect his move out of the county. But Nichols, who had lived just across the river in Kansas, was brought back to the United States and sentenced to prison for failing to update his Kansas registration. We have simply replaced a 'wide disparity among State registration requirements' with a wide disparity among Circuit registration requirements. In doing so, we thwart the intent of Congress and needlessly complicate an already complicated law.

App. 27 (citations omitted).

A similar disparity arises with respect to offenders who reside in foreign jurisdictions. For instance, two sex offenders could live in the same residence in a foreign country, with one having to register in the former jurisdiction, and the other not, depending on the state in which each offender formerly resided. Congress could not have meant SORNA's application to differ in such circumstances. Nor is it acceptable to treat such similarly situated individuals in opposite ways.

As a practical matter, the conflict in the circuits also allows offenders to game the sex offender registration system. Had Mr. Nichols moved the short distance from

Kansas to Missouri, registered as a sex offender in Missouri, habitually lived in Missouri for the requisite thirty days, then flew to the Philippines to reside, his conviction could not stand in light of *Lunsford*. But because he traveled to Missouri without residing there, his conduct – flying to the Philippines from an airport in Missouri – is considered criminal in light of *Murphy* and the decision in this case. Identical conduct, by similarly situated sex offenders, is either criminal or not depending on the offender's former residence.

Although none of the other courts of appeals have weighed in on the entrenched conflict between the Eighth and Tenth Circuits, states within those circuits suffer serious uncertainty as a result of the conflict. Without resolution of the conflict, states are left to guess as to whether the Eighth or Tenth Circuit has the better of the argument. Consider Montana, which borders both the Eighth and Tenth Circuits. Do Montana officials require offenders like Mr. Nichols to register, as the Tenth Circuit holds, or do they not require registration, as the Eighth Circuit holds? Does an offender living in the Philippines, who formerly registered in Montana, return to Montana to update his registration, as the Tenth Circuit requires, or does he not return to Montana to update his registration? This lack of notice raises serious constitutional concerns. *See, e.g.*, *United States v. Lanier*, 520 U.S. 259, 267 (1997) (stating, "no man shall be held criminally responsible for conduct which he could not reasonably understand to be proscribed").

The conundrum faced by jurisdictions outside of the Eighth and Tenth Circuits highlights the substantial importance of this issue. The uncertainty caused by the

conflict not only threatens nationwide uniformity, but also calls into serious question SORNA's application in these jurisdictions. Clarity and notice of SORNA's requirements would be welcomed by all parties, including federal prosecutors who must decide whether to embark on the expensive task of returning someone from halfway across the globe to face, as here, a SORNA registration prosecution. Given that the number of sex offenders is estimated to be in the hundreds of thousands, scarce federal resources will continue to be expended in the other jurisdictions (including the other thirty-seven states) that have yet to decide what the Eighth and Tenth Circuits have been unable to agree upon.

Finally, the public, and not simply sex offenders or those who monitor sex offenders, need to have faith that justice is dispensed fairly and evenly to all. Just as no one is above the law, no one should be able to avoid it or be subject to it simply by dint of their past geographical location. Either SORNA's registration requirement applies to those who choose to reside overseas or it does not. But it should not apply to some and not to others. Whichever interpretation of "resides" carries the day, this Court should decide this issue now, not later.

C. The Tenth Circuit Erred In Holding That Sex Offenders Who Move To Foreign Jurisdictions Must Update Registrations In Former Jurisdictions.

Contrary to the Tenth Circuit's holding, SORNA does not require a sex offender who moves to a foreign country to update a registration where he formerly resided. *Lunsford*, 725 F.3d at 862; App. 27 (Gorsuch, J., dissenting).

1. **By its plain terms, a sex offender need only register where he "resides," not where he "resided."**

Because this is an issue of statutory interpretation, the starting point is the language of the relevant statutory provisions. *Dean v. United States*, 556 U.S. 568, 572 (2009). That language requires each sex offender to "register, and keep the registration current, in each jurisdiction where the offender *resides*, where the offender *is* an employee, and where the offender *is* a student." 42 U.S.C. § 16913(a) (emphases added). "Resides" is defined as "the location of the individual's home or other place where the individual habitually lives." 42 U.S.C. § 16911(13). "Jurisdiction" is limited to federal lands (the fifty states, the District of Columbia, etc.). 42 U.S.C. § 16911(10).

Under SORNA's plain language, then, an individual need not register as a sex offender in a jurisdiction where he used to reside (or resided). Instead, a sex offender need only register in the jurisdiction where he "resides," or "habitually lives." Moreover, SORNA does not require registration in foreign countries. As such, when an individual moves to a foreign country, like the Philippines, he has no obligation to continue to register as a sex offender under SORNA as long as he lives outside of the United States. *Lunsford*, 725 F.3d at 861; App. 27 (Lucero, J., dissenting). Thus, when Mr. Nichols moved from Kansas to the Philippines, he had no duty to register or update his registration.

Congress's use of present tense verbs in § 16913(a) confirms this plain reading of the statute. In *Carr*, this Court, in interpreting § 2250(a) (the statute of conviction in this case), found significant Congress's use of present tense verbs. 560 U.S. at 448-

50. "[T]he present tense generally does not include the past." *Id.* at 448 (citing the Dictionary Act, 1 U.S.C. § 1 – "words used in the present tense include the future as well as the present."). This Court held that, because § 2250(a) regulates a person who "travels," the statute's reach did not encompass a person whose only travel occurred before the statute took effect. *Id.* In reaching this conclusion, this Court found significant the statutory context and, in particular, the fact that the word "travels" was followed "by a series of other present tense verbs." *Id.* at 449. The "undeviating use of the present tense [is] a striking indicator of its prospective orientation." *Id.* (quotations omitted).

The same analysis applies here, as § 16913(a) also includes a series of present tense verbs ("resides," "is an employee," "is a student"). Moreover, the use of the present tense in § 2250(a) confirms that Congress meant to require registration only in jurisdictions where offenders reside, not in jurisdictions where offenders used to reside. *Carr*, 560 U.S. at 449-50. Indeed, in rejecting the government's argument in *Carr* that "travels" meant "traveled," the Court noted that

> the only way to avoid an incongruity among neighboring verbs would be to construe the phrase 'resides [in] Indian country' to encompass persons who once resided in Indian country but who left before SORNA's enactment and have not since returned – an implausible reading that neither the Seventh Circuit, nor the Government, nor the dissent endorses.

Id. In other words, this Court has already recognized the implausibility of interpreting "resides" as "resided" in the context of SORNA. By adopting this implausible interpretation, the Tenth Circuit erred.

2. Other related provisions confirm that an offender must register, and update a registration, where he "resides," not where he "resided."

In § 16913(c), Congress requires, *inter alia*, a sex offender to update a registration "not later than 3 business days after each change of . . . residence." (emphasis added). Moreover, the offender must "appear in person in at least 1 jurisdiction involved" in order to update the registration. *Id.* And foreign countries, like the Philippines, are not considered involved jurisdictions for purposes of SORNA. 42 U.S.C. § 16911(10).

The inclusion of the requirement that an offender must update a registration "after" he changes his residence conforms with § 16913(a)'s requirement that he register where he "resides." In plain terms, the statutes require an offender who moves from one jurisdiction to another to register in the latter, not the former, jurisdiction. This becomes even more obvious when one considers that registration must be "in person." 42 U.S.C. § 16913(c). It strains credulity to think that an offender who moves from one jurisdiction to another would have to return to the former jurisdiction to register as a sex offender. Indeed, such a reading of the statute is untenable when a sex offender moves to a foreign country not covered by SORNA (like the Philippines). In that instance, the offender would have to return to the United States "within 3 business days" to register and update a registration "in person" "after" any change of residence.

If the Tenth Circuit is correct, "after" Mr. Nichols moved to the Philippines, he had "3 business days" to report "in person" in Kansas to update his change of residence. Practically speaking, upon his arrival in the Philippines, Mr. Nichols would have had to return immediately to update a registration form in Kansas. And,

if Mr. Nichols afterwards changed residences in the Philippines, or perhaps moved to a different foreign country, "within 3 business days," he would have to return to Kansas again to update his registration.

Such a reading of the statute is implausible. The better reading is the one advanced by the Eighth Circuit in *Lunsford* and Judge Lucero in his dissents in *Murphy* and this case. That reading is also consistent with the statutory text enacted by Congress. An offender must register, and update a registration, in the jurisdiction in which he "resides." A straightforward application of the statutory text avoids the absurd results engendered by the Tenth Circuit's position.

Moreover, the phrase "jurisdiction involved" in § 16913(c) is qualified by the last sentence of that subsection to require that registration information be provided "to all other jurisdictions in which the offender *is required to* register." 42 U.S.C. § 16913(c) (emphasis supplied). Because the Philippines is not a "jurisdiction" or a "jurisdiction involved" in which "the offender is required to register," it was never Congress's intent to require an offender who lives in a foreign country to continue to register. Even the Tenth Circuit admits as much. *Murphy*, 664 F.3d at 804 ("we clarify that SORNA does not create new reporting obligations for sex offenders living abroad.").

Finally, in 42 U.S.C. § 16928, Congress ordered the Attorney General to establish a system to identify "persons entering the United States who are required to register under this subchapter." This provision is consistent with the position that an offender does not register until "after" a change in residence, and the registration must occur

where the offender "resides," not where the offender formerly "resided." Section 16928 also indicates that Congress chose not to exercise its extraterritorial jurisdiction over offenders who live in foreign countries, as do the National Guidelines, which recognize that a sex offender "may pass beyond the reach of U.S. jurisdictions and hence may not be subject to any enforceable registration requirement under U.S. law unless and until he or she returns to the United States." 73 Fed. Reg. 38,030-01, 38,066.

3. SORNA's purpose confirms that offenders who move to a foreign country need not register or update a registration.

Again, Congress enacted SORNA to bring uniformity to the varied state sex offender registry systems. *See* 42 U.S.C. § 16901. SORNA's stated purpose is "to protect the public from sex offenders" by establishing a "comprehensive national system for the registration of those offenders." 42 U.S.C. § 16901. Again, the National Guidelines recognize that a sex offender who moves to a foreign country passes beyond the reach of SORNA unless and until he returns to the United States. 73 Fed. Reg. 38,030-01, 38,066.

In enacting SORNA, Congress did not intend SORNA as a proscription on one's right to travel; instead, Congress understood that sex offenders would move from jurisdiction to jurisdiction, and sought to regulate, not prohibit, that movement. That interstate freedom of movement is why state registry systems developed, and why Congress saw the need to bring uniformity to them via a national registry system. Under the Tenth Circuit's interpretation, however, an offender who resides in a foreign country must still register with his former jurisdiction, even though he now

resides in a jurisdiction Congress did not intend to reach. This is not what Congress envisioned when it enacted SORNA.

4. **If nothing else, the rule of lenity requires that this Court interpret SORNA in Mr. Nichols's favor.**

As explained above, the plain terms of the statutory provisions do not require sex offenders who move to foreign countries to update registrations in jurisdictions from which they moved. Yet, to the extent that the statutory provisions are considered ambiguous, that ambiguity must be resolved in Mr. Nichols's favor. "Application of the rule of lenity ensures that criminal statutes will provide fair warning concerning conduct rendered illegal and strikes the appropriate balance between the legislature, the prosecutor, and the court in defining criminal liability." *Liparota v. United States*, 471 U.S. 419, 427 (1985). As Justice Scalia recently remarked, the rule of lenity "vindicates the principle that only the legislature may define crimes and fix punishments. Congress cannot, through ambiguity, effectively leave that function to the courts – much less to the administrative bureaucracy." *Whitman v. United States*, 135 S. Ct. 352, 354 (2015) (Scalia, J., statement respecting denial of certiorari, joined by Thomas, J.). If nothing else, Mr. Nichols prevails in light of the rule of lenity.

D. This Case Is An Excellent Vehicle For Resolving The Circuit Split.

Finally, this case presents an ideal opportunity for this Court to review this issue. Mr. Nichols raised the issue in the district court and on appeal. Both the district court and a panel of the Tenth Circuit, on de novo review, addressed the issue on the merits. The full Tenth Circuit denied Mr. Nichols's petition for rehearing en banc in a published decision over two dissents, both of which urge resolution of the split

between the Eighth and Tenth Circuits.

The issue is exceptionally important because the conflict undermines the purpose of SORNA's uniform, comprehensive national sex offender registry system. As importantly, the issue involves an entrenched conflict within the courts of appeals. To quote Judge Gorsuch one last time: "*Murphy* and *Lunsford* articulate both sides of the split admirably and there's no need for further amplification here, only resolution somewhere." App. 29.

In the end, there are no procedural hurdles to overcome, and the particular issue raises a substantial issue of statutory interpretation that has split the lower courts. This case warrants this Court's review.

II. This Court Should Resolve Whether And Under What Standard Congress Can Constitutionally Delegate Its Legislative Authority To The Attorney General To Define The Scope Of A Criminal Law.

Mr. Nichols's case also presents this Court with an excellent opportunity to decide another issue of exceptional importance: whether Congress's delegation to the Attorney General to determine SORNA's reach violates the nondelegation doctrine.

In 42 U.S.C. § 16913(d), Congress delegated to the Attorney General not simply how to implement SORNA, but to decide whether it applies to hundreds of thousands of pre-Act offenders. In Judge Gorsuch's blunt words below, SORNA's delegation to the Attorney General "doesn't just grant some alphabet soup agency the power to write rules about the chicken trade. It invests in the nation's chief prosecutor the authority to devise a criminal code governing a half-million people." App. 30.

Separation of powers – the principle offended in this case – is a concept that

predates even the Constitution. *Loving v. United States*, 517 U.S. 748, 756 (1996). Indeed, it is the underlying concept of "our tripartite system of Government." *Mistretta v. United States*, 488 U.S. 361, 371 (1989). "The very structure of the Articles delegating and separating powers under Arts. I, II, and III exemplifies the concept of separation of powers . . . ." *INS v. Chadha*, 462 U.S. 919, 946 (1983). This Court "consistently has given voice to, and has reaffirmed, the central judgment of the Framers of the Constitution that, within our political scheme, the separation of governmental powers into three coordinate Branches is essential to the preservation of liberty." *Mistretta*, 488 U.S. at 380.

In this regard, the Constitution vests "[a]ll legislative Powers" with Congress, U.S. Const. Art. I, § 1, while the Executive Branch "shall take Care that the Laws be faithfully executed," U.S. Const. Art. II, § 3. Accordingly, while "defining crimes and fixing penalties are legislative . . . functions," *United States v. Evans*, 333 U.S. 483, 486 (1948), it is the Executive Branch that has the "absolute right" to prosecute, *Ex Parte United States*, 287 U.S. 241, 251 (1932); *see also Riley v. St. Luke's Episcopal Hosp.*, 252 F.3d 749, 755 (5th Cir. 2001) ("No function cuts more to the heart of the Executive's constitutional duty to take care that the laws are faithfully executed than criminal prosecution."). As Judge Gorsuch explained below:

> By separating the lawmaking and law enforcement functions, the framers sought to thwart the ability of an individual or group to exercise arbitrary or absolute power. And by restricting lawmaking to one branch and forcing any legislation to endure bicameralism and presentment, the framers sought to make the task of lawmaking more arduous still. These structural impediments to lawmaking were no bugs in the system but the point of the design: a deliberate and jealous effort to preserve room for individual liberty.

App. 34-35.

There is a doctrine – the nondelegation doctrine – that ensures that the principle of separation of powers remains intact. *See, e.g., DOT v. Ass'n of Am. Railroads*, 135 S.Ct. 1225, 1237 (2015) (Alito, J., concurring) ("The principle that Congress cannot delegate away its vested power exists to protect liberty."). It is that doctrine that prohibits Congress from delegating to the Executive Branch the power to define the reach of § 2250(a) to include pre-Act offenders.

A. This Court Should Resolve Whether Greater Specificity Is Required When Congress Delegates Its Legislative Authority To Define The Reach Of A Criminal Statute To Another Branch Of Government.

The nondelegation doctrine often finds application in the administrative or regulatory context, where this Court has held that Congress cannot, within constitutional limits, delegate its legislative authority to another branch of the government without sufficient guidance. *See, e.g., Mistretta*, 488 U.S. at 372. If Congress seeks assistance from the other branches, that assistance must be based on "common sense and the inherent necessities of government coordination." *Id.* (citing *J.W. Hampton, Jr., & Co. v. United States*, 276 U.S. 394, 406 (1928)). Any such delegation in this context (the administrative or regulatory), be it in the form of promulgating rules or creating laws, must be informed by an "intelligible principle" to which the other branch is directed to conform. *Id.* An intelligible principle is constitutionally sufficient if "Congress clearly delineates the general policy, the public agency which is to apply it, and the boundaries of the delegated authority." *American Power & Light Co. v. SEC*, 329 U.S. 90, 105 (1946).

The cases make clear that the nondelegation doctrine is one of universal reach. It applies to all walks of legislative actions. *See Mistretta*, 488 U.S. at 373-74 (collecting cases). Yet, as Judge Gorsuch persuasively explained below, the doctrine must hold more force, and require greater specificity, when the issue involves the delegation of power to define crimes or criminal sanctions. App. 39-40. It cannot be enough that such delegations are informed by an "intelligible principle." It was over two decades ago that this Court left that issue unanswered in *Touby v. United States*. 500 U.S. at 165-66. It is a question that needs an immediate answer from this Court.

The courts of appeals have candidly conceded that SORNA's pre-Act-offender delegation fails to set meaningful restraints on the Attorney General's authority. *See, e.g., United States v. Goodwin*, 717 F.3d 511, 517 (7th Cir. 2013) ("SORNA sets clear boundaries on the Attorney General's exercise of discretion in virtually every respect, with the exception of the provision at issue in this case.") The Solicitor General has essentially admitted as much on a prior occasion.[3]

The Tenth Circuit's analysis confirms this point. Below, the Tenth Circuit applied the "intelligible principle" standard from the administrative and regulatory context. App. 10. It found the delegation sufficient because Congress set forth a general policy (a national sex offender registry), delegated its authority to a specific agent (the Attorney General), and delegated a single, narrow decision to that agent (whether SORNA applies to pre-Act offenders). *Id.* 10-11.

In practice, this analysis permits Congress to abdicate its crime-defining function

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[3] *See* Brief for the United States, *Reynolds v. United States*, No. 10-6549, at 24-25, available at http://www.justice.gov/sites/default/files/osg/briefs/2010/01/01/2010-6549.mer.aa.pdf

to the Executive Branch. All Congress needs to do to avoid its constitutional duties is to state a policy ("crime is bad"), delineate an agent ("the Attorney General"), and place minimal boundaries on the delegation ("only decide whether it is criminal to do X"). The only plausible way in which this logic is sound (and it is not sound even in this respect) is if the authority to delegate the reach of a criminal statute suffices under the same standard as the authority to delegate non-criminal regulatory functions to a different Branch. That is an issue this Court has not expressly resolved, *Touby*, 500 U.S. at 165-66, but it is one that this Court should resolve.

Decisions of this Court indicate that the delegation of criminal penalties are subject to greater specificity. *See, e.g., Fahey v. Mallonee*, 332 U.S. 245, 250 (1947) ("But the provisions of the statute under attack are not penal provisions . . . . The provisions are regulatory."); App. 11 (acknowledging that "the Court has repeatedly and long suggested that in the criminal context Congress must provide more 'meaningful[]' guidance than an 'intelligible principle.'"). Yet below, instead of requiring greater specificity or more meaningful guidance, the Tenth Circuit required none at all. App. 10-11.

It is one thing for Congress to seek guidance on non-criminal regulations; it is quite another for Congress to delegate the reach of a criminal provision to the branch of government charged with prosecuting those who violate that provision. Can the Executive Branch both define the reach of a criminal statute, and then prosecute those who fall within that reach? And, even if this is proper, can it happen with no guidance from Congress? Whatever the answer, the ultimate question of specificity

should be addressed, and resolved, by this Court.

B. The Tenth Circuit Erred When It Held That Congress's Delegation To The Attorney General In § 16913(d) Is Constitutional.

Contrary to the Tenth Circuit's decision, Congress cannot delegate its legislative authority to define the reach of SORNA's criminal sanctions to the Executive Branch without meaningful constraints. In *Reynolds*, this Court held that SORNA, by its own terms, does not extend to pre-Act offenders like Mr. Nichols; rather, SORNA extends to such offenders only in light of § 16913(d)'s delegation to the Attorney General and the Attorney General's subsequent decision to include pre-Act offenders within SORNA's reach. 132 S.Ct. at 978. This holding prompted this comment in dissent by Justice Scalia, joined by Justice Ginsburg:

> it is not entirely clear to me that Congress can constitutionally leave it to the Attorney General to decide – with no statutory standard whatever governing his discretion – whether a criminal statute will or will not apply to certain individuals. That seems to me sailing close to the wind with regard to the principle that legislative powers are nondelegable.

Id. at 986. In dissent below, Judge Gorsuch went further: "as it turns out, the statute doesn't just sail close to the wind. It sails right into it." App. 33.

Cases from this Court on the delegation of criminal penalties support Judge Gorsuch's conclusion that SORNA's application to pre-Act offenders violates the nondelegation doctrine. *See, e.g.*, *Schechter Poultry Corp. v. United States*, 295 U.S. 495, 529, 542-43 (1935) (holding that Congress could not delegate to the Executive the power to approve codes of fair competition promulgated by trade associations, when the "[v]iolations of the provisions of the codes are punishable as crimes"); *Panama Refining Co. v. Ryan*, 293 U.S. 388 (1935) (holding, with respect to legislation

providing for criminal sanctions, that Congress unconstitutionally delegated its legislative power to the Executive Branch); *United States v. George*, 228 U.S. 14, 20-22 (1913) (rejecting government's argument that federal agency could promulgate regulations creating a federal crime to fail to abide by agency requirements).

As Judge Gorsuch forcefully demonstrated below, § 16913(d) does not define or circumscribe the Attorney General's discretion with respect to the reach of SORNA's criminal provision to pre-Act offenders. App. 31, 48-49. In fact, it offers no guidance whatsoever for how the Attorney General ought to exercise her authority in this regard. *Id.* There is little in the way of intelligible guiding principles anywhere at all in SORNA, much less anything in the way of specific standards or explicitly defined limitations on the Executive's discretion. And, as in the cases cited above, this point is doubly important because SORNA creates a federal crime for which the Executive has the ability to define its reach, then prosecute those within that reach.

Those cases further confirm what Justices Scalia and Ginsburg suggest in their dissent in *Reynolds*, and what Judge Gorsuch proves in dissent below: that Congress's delegation of its legislative powers in § 16913(d) violates the Constitution's nondelegation doctrine. 132 S.Ct. at 986. That delegation fails to place any meaningful boundaries on the Attorney General's discretion in that the Attorney General can determine whether none, some, or all pre-Act offenders fall under SORNA's reach. *See United States v. Hinckley*, 550 F.3d 926, 948 (10th Cir. 2008) (Gorsuch, J., concurring). Because Congress unlawfully delegated this authority in § 16913(d) to the Attorney General, that delegation should be stricken as

unconstitutional, and pre-Act offenders should not be subject to the criminal penalties in 18 U.S.C. § 2250(a).

C. This Case Is An Excellent Vehicle For Deciding This Exceptionally Important Question.

Mr. Nichols challenged the constitutionality of Congress's delegation to the Attorney General in § 16913(d) in both the district court and the court of appeals. Both courts rejected the argument, under de novo review. The Tenth Circuit refused to consider the issue en banc, over the dissents of two judges. The issue is ripe for review. No procedural hurdles stand in the way.

Moreover, at present, hundreds of thousands of pre-Act offenders like Mr. Nichols are subject to imprisonment if they fail to register or update their sex offender registrations. They are subject to imprisonment only because the Attorney General has said that they should be subject to imprisonment. *Reynolds*, 132 S.Ct. at 978. The constitutionality of this delegation is one this Court has not yet considered. In Judge Gorsuch's words, "[t]he day to decide [the issue] is now upon us." App. 33.

CONCLUSION

For the above-stated reasons, this Court should grant this petition to review the Tenth Circuit's judgment in this case.

Respectfully submitted,

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United States Court of Appeals
Tenth Circuit

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Clerk of Court

PUBLISH

UNITED STATES COURT OF APPEALS

TENTH CIRCUIT

UNITED STATES OF AMERICA,

Plaintiff - Appellee,

v.

LESTER RAY NICHOLS,

Defendant - Appellant.

No. 14-3041

Appeal from the United States District Court
for the District of Kansas
(D.C. No. 6:13-CR-10106-JTM-1)

Timothy J. Henry, Assistant Public Defender (Melody Brannon Evans, Federal Public Defender, with him on the briefs), Office of the Federal Public Defender, Wichita, Kansas, for Appellant.

James A. Brown, Assistant United States Attorney (Barry R. Grissom, United States Attorney, with him on the brief), Office of the United States Attorney, Topeka, Kansas, for Appellee.

Before **McHUGH, McKAY,** and **BALDOCK,** Circuit Judges.

McHUGH, Circuit Judge.

I. INTRODUCTION

Lester Nichols is a convicted sex offender who left the United States without updating his status on the federal sex offender registry. He was brought back to the United States and charged with failing to register, in violation of the Sex Offender Registration and Notification Act (SORNA), 18 U.S.C. § 2250(a). On appeal, he challenges his conviction based on two theories: (1) SORNA's updating requirement does not apply in situations like his where the sex offender moves from a SORNA jurisdiction to a non-SORNA jurisdiction, and (2) SORNA's delegation of authority to the Attorney General to determine SORNA's retroactive application is unconstitutional. We reject both arguments and therefore affirm Mr. Nichols's conviction.

II. BACKGROUND

In 2003, Mr. Nichols was convicted of traveling interstate with the intent to engage in sex with a minor, in violation of 18 U.S.C. § 2423(b). He was sentenced to 120 months imprisonment. Although Mr. Nichols's conviction occurred before SORNA's 2006 enactment, the U.S. Attorney General issued a rule in 2007 extending the requirements of SORNA "to all sex offenders, including sex offenders convicted of the offense for which registration is required prior to the enactment of that Act." 28 C.F.R. § 72.3. This rule was issued pursuant to the authority Congress delegated to the Attorney General under SORNA. *See* 42 U.S.C. § 16913(d) ("The Attorney General shall have the authority to specify the applicability of the requirements of this subchapter to sex offenders convicted before the enactment of this chapter . . . ."). Mr. Nichols, as a

preenactment sex offender, is thus required to comply with SORNA's registration requirements.

By 2012, Mr. Nichols had been released from prison and was placed under federal supervision in the District of Kansas. Up until that time, he had complied with both the Kansas and SORNA sex offender registration requirements. In November 2012, Mr. Nichols took a plane from Kansas City to Manila, Philippines, without updating his sex offender registry. One month later, he was arrested by Philippine law enforcement officers and was turned over to State Department custody for deportation to the United States. Mr. Nichols was charged with and indicted for one count of failure to update a registration as required by SORNA. *See* 18 U.S.C. § 2250(a).

Mr. Nichols moved to dismiss the indictment. He argued before the district court that SORNA did not require him to register as a sex offender while he was in the Philippines because, once in the Philippines, he did not reside in a U.S. jurisdiction. Mr. Nichols also contended SORNA's delegation of authority to the Attorney General to determine SORNA's application to preenactment sex offenders like him is unconstitutional.

The district court rejected Mr. Nichols's first argument in light of *United States v. Murphy*, 664 F.3d 798 (10th Cir. 2011), where we held that a defendant violated SORNA when he moved from Utah to Belize without updating his status on the sex offender registry. The district court also rejected Mr. Nichols's nondelegation argument. The court acknowledged the lack of binding Tenth Circuit precedent addressing this issue, but

noted our observation in dicta that SORNA's registration provision does not violate the nondelegation doctrine. *United States v. Carel*, 668 F.3d 1211, 1214 (10th Cir. 2011). The district court also looked to *United States v. Rickett*, 535 F. App'x 668 (10th Cir. 2013) (unpublished), wherein we rejected a nondelegation argument under plain error review because, absent controlling precedent, application of SORNA to a preenactment offender was not plainly unconstitutional. Finally, the district court explained that the clear weight of authority from other circuits has rejected nondelegation challenges to 42 U.S.C. § 16913(d). Accordingly, the district court ruled SORNA's delegation of authority under § 16913(d) is not unconstitutional and denied Mr. Nichols's motion to dismiss. Mr. Nichols thereafter entered a conditional guilty plea, reserving the right to appeal both issues. He now does so and we exercise our jurisdiction under 28 U.S.C. § 1291.

III. DISCUSSION

Mr. Nichols appeals both elements of the district court ruling. He first contends SORNA's requirement that an offender keep his registration current does not apply to offenders who change their residence to a non-SORNA jurisdiction. In so arguing, he asks us to overturn our precedent in *United States v. Murphy*, wherein we held, "a sex offender, upon changing his residence, [must] update his registration in a jurisdiction involved . . . even if he did not establish a new residence in a SORNA jurisdiction." 664 F.3d 798, 803 (10th Cir. 2011). Mr. Nichols alternatively argues we should vacate his conviction on the basis that 42 U.S.C. § 16913(d) creates an unconstitutional delegation of authority by permitting the Attorney General to determine SORNA's application to

preenactment sex offenders. These issues "involve statutory interpretations of and constitutional challenges to SORNA," which we review de novo, "interpreting the words of the statute in light of the purposes Congress sought to serve." *United States v. Hinckley*, 550 F.3d 926, 928 (10th Cir. 2008) (brackets and internal quotation marks omitted), *abrogated on other grounds by Reynolds v. Unites States*, 132 S. Ct. 975 (2012).

A. Extraterritorial Changes of Residence under SORNA

SORNA requires sex offenders to "register, and keep the registration current, in each jurisdiction where the offender resides, where the offender is an employee, and where the offender is a student." 42 U.S.C. § 16913(a). SORNA defines "jurisdiction" as including U.S. states, territories, and Indian reservations, but not foreign nations. *Id.* § 16911(10). It defines "resides" as "the location of the individual's home or other place where the individual habitually lives." *Id.* § 16911(13). When a sex offender has a change of residence, he "keep[s] the registration current" by "not later than 3 business days after each change of . . . residence . . . appear[ing] in person in at least 1 jurisdiction involved pursuant to subsection (a) of this section and inform[ing] that jurisdiction of all changes in the information required for that offender in the sex offender registry." *Id.* § 16913(c). In regard to his residence, the sex offender must provide for the registry "[t]he address of each residence at which the sex offender resides or will reside." *Id.* § 16914(a)(3). Mr. Nichols argues the plain language of these SORNA provisions indicates that the

requirement to "keep the registration current" does not apply to sex offenders who have a change of residence to a non-SORNA jurisdiction.

We squarely addressed this issue in *United States v. Murphy*, 664 F.3d 798 (10th Cir. 2011). The defendant in *Murphy* was a registered sex offender who had resided in a correctional facility in Utah, departed from Utah by bus, arrived in California, then took a taxi to Mexico, and ultimately ended up in Belize where he lived for six months. *Id.* at 799–800. Mr. Murphy was deported to the United States and was charged with and convicted of failing to update his sex offender registry, in violation of 18 U.S.C. §2250(a). *Id.* at 800. On appeal, Mr. Murphy challenged his conviction on the basis that he had no obligation to update his registration after he left a SORNA jurisdiction for a non-SORNA jurisdiction. *Id.*

We affirmed Mr. Murphy's conviction, interpreting SORNA otherwise. We interpreted the phrase "jurisdiction where the offender resides" from § 16913(a) and term "residence" as used in § 16913(c) as two different concepts—the former meaning "the state where the individual keeps his home or habitually lives" and the latter meaning "a specific dwelling place . . . where an offender habitually lives." *Id.* at 800–801. And we concluded the two terms trigger different obligations: "the offender's jurisdiction is where he must keep his registration current, while the offender's residence is a specific piece of registry information, a change of which sparks a reporting duty." *Id.* at 801.

From this interpretation, we drew three conclusions. First, "abandoning one's living place constitutes a change in residence under SORNA." *Id.* Second, "[w]hen an

offender leaves a residence in a state, and then leaves the state entirely, that state remains a jurisdiction involved." *Id.* at 803. And third, "a reporting obligation does not disappear simply because an individual manages to relocate to a non-SORNA jurisdiction before the three-day deadline for updating a registration has passed." *Id.* Applying this interpretation to Mr. Murphy's case, we ruled, "a legal obligation to update his registration attached" when Mr. Murphy left the correctional facility "while he was still in Utah, and not when he arrived in Belize." *Id.* at 804. And even though Mr. Murphy "was no longer living in Utah when his failure to register became punishable" (i.e., three days after his change of residence), "Utah remained a 'jurisdiction involved' under SORNA because it was his current jurisdiction when the reporting obligation arose." *Id.* We therefore affirmed his conviction for failure to register under § 2250(a).

Earlier this year we reaffirmed *Murphy*'s interpretation of SORNA. *United States v. Lewis*, 768 F.3d 1086, 1091–92 (10th Cir. 2014). We explained in *Lewis* that "*Murphy*'s logic [is] controlling" and concluded, "The effect of *Murphy*'s holding is that the abandonment of a permanent residence triggers a sex offender's obligation to update his registration" and "the departure district remains a 'jurisdiction involved' even after the sex offender has left the state." *Id.*

Mr. Nichols contends that *Murphy* misinterpreted SORNA and we should therefore overturn it. In so arguing, Mr. Nichols relies primarily on three sources: (1) Judge Lucero's dissenting opinion in *Murphy*, 664 F. 3d at 806, which asserted that the majority "impermissibly rejects the statutory definition of 'resides' . . . . [and] avoids

a plain text reading of the statute by giving two different meanings to the defined term 'resides'"; (2) the Eighth Circuit's opinion in *United States v. Lunsford*, 725 F.3d 859, 862 (8th Cir. 2013), which disagreed with *Murphy*'s interpretation of SORNA; and (3) the U.S. Supreme Court's decision in *Carr v. United States*, 560 U.S. 438, 447–49 (2010), which looked to the plain language of § 2250 and concluded Congress's use of present tense verbs "strongly supports a forward-looking construction" and therefore the elements of § 2250 must be met sequentially for a violation to occur.

Regardless of the merits of these arguments, we are bound by the majority opinion in *Murphy*. Indeed, one panel of this court cannot overrule the judgment of another panel "absent en banc consideration . . . [or] an intervening Supreme Court decision that is contrary to or invalidates our previous analysis." *United States v. Brooks*, 751 F.3d 1204, 1209 (10th Cir. 2014) (internal quotation marks omitted). Neither exception to our horizontal stare decisis rule is present here. Mr. Nichols attempts to characterize *Carr* as the type of contrary Supreme Court authority that would invalidate *Murphy*. But *Carr* was decided before *Murphy* and is therefore not an intervening decision. And although Mr. Nichols correctly notes that *Murphy* did not address the Supreme Court's *Carr* decision, our later *Lewis* decision did, ruling that *Carr* "does not dictate an alternative conclusion" to the conclusion reached in *Murphy*. 768 F.3d at 1091 n.4. *Murphy* is therefore controlling.

Applying *Murphy*'s interpretation of SORNA to this case, we affirm Mr. Nichols's conviction under § 2250(a). By boarding the plane to the Philippines, Mr. Nichols

abandoned his residence in Kansas—a "jurisdiction involved." This change in residence triggered a registry obligation in Kansas, which Mr. Nichols did not fulfill. Mr. Nichols therefore violated § 2250(a) by failing to update his registry in Kansas within three days of his change in residence.

B. Delegation under SORNA

Mr. Nichols alternatively argues we should vacate his SORNA conviction on the basis that SORNA's delegation of authority to the Attorney General to determine SORNA's preenactment application, 42 U.S.C. § 16913(d), is unconstitutional. Mr. Nichols insists that in applying the nondelegation doctrine to this case, we should apply a heightened "meaningful constraint" standard, instead of the more lenient "intelligible principles" standard, because Congress delegated authority under SORNA that relates to the imposition of criminal liability. We disagree both as to the relevant legal standard and the application of that standard and conclude that § 16913(d) does not violate the nondelegation doctrine.

1. The Nondelegation Doctrine

Under the U.S. Constitution, "[a]ll legislative Powers herein granted shall be vested in a Congress of the United States." U.S. CONST., art. I, § 1. From this language and based on separation of powers principles, the Supreme Court "has derived the nondelegation doctrine: that Congress may not constitutionally delegate its legislative power to another branch of Government." *Touby v. United States*, 500 U.S. 160, 165 (1991). Nonetheless, Congress may delegate authority to a different branch, and "[s]o

long as Congress shall lay down by legislative act an intelligible principle to which the person or body authorized to exercise the delegated authority is directed to conform, such legislative action is not a forbidden delegation of legislative power." *Mistretta v. United States*, 488 U.S. 361, 372 (1989) (brackets and internal quotation marks omitted). The Supreme Court has further explained that an intelligible principle exists so long as "Congress clearly delineates [1] the general policy, [2] the public agency which is to apply it, and [3] the boundaries of this delegated authority." *Id.* at 372–73.[1]

2. Delegation under 42 U.S.C. § 16913(d)

Applying this standard to SORNA, we concluded that § 16913(d) does not violate the nondelegation doctrine. The language of SORNA demonstrates, first, that Congress clearly delineated the general policy upon which SORNA is based. Section 16901 expresses the congressional policy embodied in SORNA: "to protect the public from sex

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[1] Under this standard, the Supreme Court has struck down statutes delegating power to an administrative agency on only two occasions, "one of which provided literally no guidance for the exercise of discretion, and the other of which conferred authority to regulate the entire economy on the basis of no more precise a standard than stimulating the economy by assuring 'fair competition.'" *Whitman v. Am. Trucking Associations*, 531 U.S. 457, 474 (2001) (citing *Panama Refining Co. v. Ryan*, 293 U.S. 388 (1935); *A.L.A. Schechter Poultry Corp. v. United States*, 295 U.S. 495 (1935)). *Panama Refining Co.* and *Schechter Poultry* constitute the "outer limits" of the Supreme Court's nondelegation precedent and demonstrate the Court's reticence "to second-guess Congress regarding the permissible degree of policy judgment that can be left to those executing or applying the law." *Id.* at 474–75 (internal quotation marks omitted); *see also United States v. Rickett*, 535 F. App'x 668, 675 (10th Cir. 2013) (unpublished), *cert. denied*, 134 S. Ct. 1529 (2014) ("[T]he Supreme Court has never expressly overruled *Schechter Poultry* or *Panama Refining;* so the doctrine, even if dead, has never received a proper burial.").

offenders and offenders against children" by establishing "a comprehensive national system for the registration of those offenders." This policy statement conveys the intelligible principles upon which the Attorney General's delegated authority must be based. *See United States v. Kuehl*, 706 F.3d 917, 920 (8th Cir. 2013) (concluding that SORNA's broad policy statement contained in § 16901 is "sufficient to provide an intelligible principle for delegation"); *United States v. Goodwin*, 717 F.3d 511, 516 (7th Cir. 2013) (explaining that § 16901 "provides sufficient guidance to the Attorney General").

Second, Congress clearly delineated "the public agency which is to apply" the authority by specifying the Attorney General as the executive official to whom it delegated authority under SORNA.

Third, Congress also clearly delineated the boundaries of the authority it delegated to the Attorney General. Section 16913(d) delegates to the Attorney General a single, narrow decision: to determine SORNA's application to preenactment sex offenders. Under this delegation, "the Attorney General cannot do much more than simply determine whether or not SORNA applies to those individuals." *United States v. Guzman*, 591 F.3d 83, 93 (2nd Cir. 2010). This circumscribed question is further "constrained by the legislative determinations that Congress made in other sections of SORNA," including the provisions pronouncing which crimes are subject to SORNA, § 16911, where the offender must register, § 16913(a), the timeframe within which the offender must register, § 16913(b), the method of registration, § 16913(b)–(c), and the information

the offender must include in the registry, § 16914(a). *United States v. Cooper*, 750 F.3d 263, 272 (3d Cir.), *cert. denied*, 135 S. Ct. 209 (2014). Congress also explicitly outlined the elements of the failure-to-register crime in § 2250. The authority Congress delegated under § 16913(d) is therefore bounded by the limited nature of the retroactive determination itself and the guidance Congress provided in other SORNA provisions.

Accordingly, we hold that § 16913(d) meets the Supreme Court's intelligible principles test because Congress clearly delineated SORNA's general policy, the public agency to which Congress delegated its authority, and the boundaries of this delegation. *See Mistretta*, 488 U.S. 372–73.

Mr. Nichols asserts, however, that we should apply the more rigorous "meaningfully constrains" standard instead of the "intelligible principle" standard because § 16913(d) delegates Congress's authority to regulate a statute with criminal consequences. In so arguing, Mr. Nichols relies on *Touby v. United States*, in which the Supreme Court acknowledged the possibility that "something more than an 'intelligible principle' is required when Congress authorizes another Branch to promulgate regulations that contemplate criminal sanctions," but declined to resolve the issue because, even under a more stringent standard, the provision at issue in *Touby* "meaningfully constrains the Attorney General's discretion to define criminal conduct." 500 U.S. 160, 165–66 (1991). Mr. Nichols contends that this case is the appropriate vehicle to institute the more searching "meaningfully constrains" standard, and that § 16913(d) fails under that standard.

The Third Circuit recently confronted this issue in *Cooper*, 750 F.3d at 270–71. The *Cooper* court recognized the Supreme Court left open the question whether a heightened "meaningfully constrains" standard applies to Congress's delegation of authority involving statutes with criminal implications. *Id.* at 271. But as the Third Circuit further explained, the meaningful constraints standard "has been referenced in only a handful of cases, none of which set forth factors or a substantive analytical framework against which to assess whether a specific delegation satisfies the standard." *Id.* The Third Circuit therefore refused to invoke the meaningfully constrains standard "[u]ntil the Supreme Court gives us clear guidance to the contrary." *Id.*

We likewise decline to abandon the well-settled "intelligible principle" standard for the undeveloped "meaningfully constrains" standard. And because Congress provided an intelligible principle to which the Attorney General must conform in exercising the authority delegated under § 16913(d), we join our sister circuits[2] in concluding that § 16913(d) does not violate the nondelegation doctrine.[3]

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[2] *United States v. Cooper*, 750 F.3d 263, 271–72 (3d Cir.), *cert. denied*, 135 S. Ct. 209 (2014); *United States v. Richardson*, 754 F.3d 1143, 1146 (9th Cir. 2014); *United States v. Sampsell*, 541 F. App'x 258, 259–60 (4th Cir. 2013) (unpublished) (per curiam); *United States v. Goodwin*, 717 F.3d 511, 516–17 (7th Cir. 2013); *United States v. Kuehl*, 706 F.3d 917, 919–20 (8th Cir. 2013); *United States v. Parks*, 698 F.3d 1, 7–8 (1st Cir. 2012); *United States v. Felts*, 674 F.3d 599, 606 (6th Cir. 2012); *United States v. Guzman*, 591 F.3d 83, 92–93 (2nd Cir. 2010); *United States v. Whaley*, 577 F.3d 254, 263–64 (5th Cir. 2009); *United States v. Ambert*, 561 F.3d 1202, 1213 (11th Cir. 2009).

[3] We acknowledge the concern some federal judges have expressed with Congress's delegation of such an important question. *See Reynolds v. United States*, 132

Continued . . .

IV. CONCLUSION

For these reasons, we AFFIRM Mr. Nichols's conviction for failure to register in violation of 18 U.S.C. § 2250(a).

Cont.

S. Ct. 975, 986 (2012) (Scalia, J., dissenting) (opining that § 16913(d)'s delegation of authority to the Attorney General "sail[s] close to the wind with regard to the principle that legislative powers are nondelegable"); *United States v. Hinckley*, 550 F.3d 926, 948 (10th Cir. 2008) (Gorsuch, J., concurring) (applying principles of constitutional avoidance to prevent an interpretation that would allow the Attorney General to choose "willy nilly" between either of "two extremes" or anything in between in determining SORNA's application to preenactment offenders). Although we agree that Congress's delegation of this important decision is puzzling, *see Cooper*, 750 F.3d at 272, we conclude that it nonetheless passes constitutional muster.

14-3041, *United States v. Nichols*

McKAY, Circuit Judge, concurring.

I concur with the panel's opinion with regard to the nondelegation doctrine question. I also concur that, under these facts, our decision in *United States v. Murphy*, 664 F.3d 798 (10th Cir. 2011), binds us with regard to the application of SORNA, and compels this court to determine that Kansas remained a "jurisdiction involved" under the Act even after Mr. Nichols abandoned his residence there. I write separately to express disagreement with the majority in *Murphy*, agreement with the dissent in *Murphy* by Judge Lucero, and my belief that consideration of this case by the full en banc court would be appropriate.

Judge Lucero's interpretation of SORNA's registration requirements accords with that of the Eighth Circuit in *United States v. Lunsford*, 725 F.3d 859 (8th Cir. 2013). *Lunsford* held that an individual who abandons a residence in a jurisdiction covered by SORNA to move to a jurisdiction not covered by SORNA no longer resides in a "jurisdiction involved" under the Act and therefore has no obligation to register. *Id.* at 861. I am persuaded by this reading of SORNA's plain language, however, the majority opinion in *Murphy* currently controls this case, and I accordingly concur.

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF KANSAS

United States of America,

Plaintiff,

vs. Case No. 13-10106-JTM

Lester Ray Nichols,

Defendant.

MEMORANDUM AND ORDER

The defendant, Lester Ray Nichols, is charged with knowingly failing to register and update his registration as required by the Sex Offender Registration and Notification Act (SORNA) in violation of 18 U.S.C. § 2250(a). The matter is before the court on Nichols's motion to dismiss the charge, arguing that SORNA does not apply to him under the circumstances of his case.

In 2003, Nichols was convicted of interstate travel to engage in sex with a minor, in violation of 18 U.S.C. § 2423(b). *United States v. Nichols*, No. 03-10127-MLB (D. Kan. Dec. 17, 2003). He was sentenced to 120 months imprisonment.

Nichols was released from prison and under federal supervision in the District of Kansas in 2012. Up until that time, he had complied with both Kansas and federal authorities in keeping his sex offender registry up to date every three months. He last

registered in early October, 2012, and he was to renew his registration in early January, 2013.

However, in early November, 2012, Nichols boarded a plane from Kansas City International Airport to Manila, Philippines. On November 16, a warrant was issued to arrest Nichols for violation of his supervised release.

On December 26, 2012, law enforcement officers of the Manila Police and Philippine Bureau of Immigration arrested Nichols at a Manila hotel. After he was identified, Nichols met with an agent of the United States Department of State, Diplomatic Security Service (DSS). Nichols was held in custody and deported by plane to Los Angeles, California, where he was taken into custody by the United States Marshal Service and transported to Kansas to face the present charge.

Nichols contends that SORNA did not require him to register as a sex offender while he was in the Philippines. 42 U.S.C. § 16913(a) requires:

> A sex offender shall register, and keep the registration current, in each jurisdiction where the offender resides, where the offender is an employee, and where the offender is a student. For initial registration purposes only, a sex offender shall also register in the jurisdiction in which convicted if such jurisdiction is different from the jurisdiction of residence.

SORNA explicitly defines "jurisdiction" as:

> (A) A State.
> (B) The District of Columbia.
> (C) The Commonwealth of Puerto Rico.
> (D) Guam.
> (E) American Samoa.
> (F) The Northern Mariana Islands.
> (G) The United States Virgin Islands.
> (H) To the extent provided and subject to the requirements of section 16927

of this title, a federally recognized Indian tribe.

42 U.S.C. § 16911(10). Further, SORNA provides that "[t]he term 'resides' means, with respect to an individual, the location of the individual's home or other place where the individual habitually lives." 42 U.S.C. § 16911(13).

Finally, 42 U.S.C. § 16928 provides:

> The Attorney General, in consultation with the Secretary of State and the Secretary of Homeland Security, shall establish and maintain a system for informing the relevant jurisdictions about persons entering the United States who are required to register under this subchapter. The Secretary of State and the Secretary of Homeland Security shall provide such information and carry out such functions as the Attorney General may direct in the operation of the system.

The defendant agues that he does not fall under SORNA because he resided in the Philippines, a foreign country. In advancing this argument, the defendant acknowledges *United States v. Murphy*, 664 F.3d 798 (10th Cir. 2011). In *Murphy*, the court held the defendant violated SORNA when he moved form his residence in Utah to Belize. It observed that

> although SORNA gives a sex offender the ability to satisfy his registration requirement in one state by updating his registration in another state, he cannot do so by registering in a foreign country, because it is not a SORNA jurisdiction. Thus, a sex offender relocating abroad must satisfy his reporting obligations in a jurisdiction involved.
>
> In sum, it is plain that the definitions in § 16911 and the registration obligation in § 16913 require a sex offender, upon changing his residence, to update his registration in a jurisdiction involved—in this case, where the offender has a home or habitually lives or works—even if he did not establish a new residence in a SORNA jurisdiction. To put it more directly, when a sex offender changes residences, jobs, or student status, a reporting obligation arises in a state where he lives, works, or is in school.

664 F.3d at 803. According to the court, the SORNA requirement that the defendant update his registration "attached when he left Bonneville, while he was still in Utah, and not when he arrived in Belize." *Id.* at 804.

Here, Nichols advances several rationales as to why *Murphy* was mistaken, including the verb tense used for "resides" under 42 U.S.C. § 16911(13), and that the intent of Congress to limit the extraterritorial effect of SORNA is reflected in 42 U.S.C. § 16928. He also notes that similar arguments have succeeded in persuading the Eighth Circuit to reach a conclusion contrary to *Murphy* in *United States v. Lunsford*, 725 F.3d 859 (8th Cir. 2013).

Murphy, however, remains controlling authority, and establishes that Nichols violated SORNA when he did not update his registration in Kansas prior to departing for Manilla. Under SORNA, "[t]he permanent abandonment of an abode constitutes a change of residence, regardless of whether a new residence has been formally adopted." *Murphy*, 664 F.3d at 802-03. While Nichols could not make a new registration in the Philippines, SORNA permitted and required notice of the change in State of Kansas. "[T]his statutory construction aligns with legislative intent, because Congress's goal in enacting SORNA was to ensure that sex offenders could not avoid registration requirements by moving out of state." *Id.*

Alternatively, Nichols argues that 42 U.S.C. § 16913(d) is unconstitutional, as the statute improperly delegates legislative power to the Attorney General to determine whether SORNA should be applied retroactively to pre-Act offenders. Again, Nichols

acknowledges that there is a recent Tenth Circuit case reaching a contrary conclusion, *United States v. Rickett*, ___ Fed. Appx. ___, 2013 WL 4750781 (10th Cir. 2013). He correctly notes that in *Rickett*, the court did not directly address the issue of whether application of SORNA to pre-Act offenders violates the non-delegation principle. In *Rickett*, the defendant had pled guilty to the offense, so the Tenth Circuit only decided that the application of SORNA was not plain error.

Plain error is "(1) error that is (2) plain, (3) affects substantial rights, and (4) seriously affects the fairness, integrity, or public reputation of judicial proceedings." *United States v. DeChristopher*, 695 F.3d 1082, 1091 (10th Cir.2012). In *Rickett*, the court held that the defendant's SORNA challenge failed at the second stage; since the "purported constitutional infirmity under the nondelegation doctrine is anything but plain (i.e., clear or obvious), we ... need not reach prongs one, three, or four." 2013 WL 4750781, at *5. The court held that the defendant could not establish plain error, because under this standard "to render an alleged error 'clear' or 'obvious,' Mr. Rickett needs *controlling* Supreme Court or Tenth Circuit precedent, or a hefty weight of *controlling* authority from other circuits. *Id.* at *7 (emphasis in *Rickett*). Since the defendant could cite to only a few "concurring and dissenting opinions of several jurists who have noted a potential delegation problem with § 16913(d)'s grant of authority to the Attorney General," he did not meet this standard. *Id.*

However, while *Rickett* is not controlling here given its plain error analysis, the rest of the opinion places his argument strongly in doubt. First, the Tenth Circuit reviewed the history of the nondelegation doctrine, ultimately concluding that the doctrine was virtually

dead:

> To facilitate our analysis of whether any error here is "clear" or "obvious" we begin with a brief discussion of the origin and evolution of the nondelegation doctrine. "The nondelegation doctrine is rooted in the principle of separation of powers that underlies our tripartite system of Government." *Mistretta v. United States*, 488 U.S. 361, 371, 109 S.Ct. 647, 102 L.Ed.2d 714 (1989). The doctrine derives from the Constitution's opening declaration that "[a]ll legislative Powers herein granted shall be vested in a Congress of the United States." U.S. Const. art. I, § 1. Fidelity to the constitutional text and to the structure of government that the Constitution sets up "mandate[s] that Congress generally cannot delegate its legislative power to another Branch." *Mistretta*, 488 U.S. at 372. Congress may, however, vest "decisionmaking authority" in a coordinate branch so long as it provides "an intelligible principle to which the person or body authorized to [act] is directed to conform." *Whitman v. Am. Trucking Ass'ns*, 531 U.S. 457, 472, 121 S.Ct. 903, 149 L.Ed.2d 1 (2001) (alteration in original) (quoting *J.W. Hampton, Jr., & Co. v. United States*, 276 U.S. 394, 409, 48 S.Ct. 348, 72 L.Ed. 624 (1928)) (internal quotation marks omitted).
>
> Between 1789 and 1935 – a period spanning 146 years of constitutional history – the Supreme Court "never struck down a challenged statute on delegation grounds." *Mistretta*, 488 U.S. at 373. Then, in 1935, the Court invalidated two statutes as unconstitutional delegations of legislative power. *See A.L.A. Schechter Poultry Corp. v. United States*, 295 U.S. 495, 542, 55 S.Ct. 837, 79 L.Ed. 1570 (1935); *Panama Refining Co. v. Ryan*, 293 U.S. 388, 430, 55 S.Ct. 241, 79 L.Ed. 446 (1935); *see also* 1 Ronald D. Rotunda & John E. Nowak, TREATISE ON CONSTITUTIONAL LAW: SUBSTANCE AND PROCEDURE § 4.8(b), at 649 n. 17 (5th ed. 2012) ("The only time the Court clearly invalidated a statute for being an excessive delegation of legislative authority was 1935.").
>
> The doctrine went dormant thereafter, and the Supreme Court has since upheld, "without deviation, Congress' ability to delegate power under broad standards." *Mistretta*, 488 U.S. at 373; *see Whitman*, 531 U.S. at 474. Indeed, so dormant is the nondelegation doctrine that some have deemed it a "dead letter." *See* Gary Lawson, Delegation and Original Meaning, 88 VA. L.REV. 327, 329 (2002). Still, the Supreme Court has never expressly overruled *Schechter Poultry* or *Panama Refining*; so the doctrine, even if dead, has never received a proper burial.

2013 WL 4750781, at *5-6.

Second, while some dissenting and concurring opinions have suggested a nondelegation doctrine challenge to the application of SORNA to pre-Act offenders, the court stressed that the decisions squarely considering the issue are "abundant," and that the "clear weight of appellate authority" rejects the argument. *Id.* at *7.

> [W]e note that neither the Supreme Court nor our court has ever addressed whether § 16913(d) is an unconstitutional delegation to the Attorney General.... Moreover, those circuits that have considered similar nondelegation challenges to SORNA have uniformly rejected them. *See, e.g., United States v. Kuehl*, 706 F.3d 917, 920 (8th Cir.2013); *United States v. Parks*, 698 F.3d 1, 7–8 (1st Cir.2012), cert. denied, --- U.S. ----, 133 S.Ct. 2021, 185 L.Ed.2d 889 (2013); *United States v. Felts*, 674 F.3d 599, 606 (6th Cir.2012); *United States v. Guzman*, 591 F.3d 83, 91–93 (2d Cir.2010); *United States v. Whaley*, 577 F.3d 254, 263–64 (5th Cir.2009); *United States v. Ambert*, 561 F.3d 1202, 1212–15 (11th Cir.2009); *see also Kuehl*, 706 F.3d at 920 ("We agree with our sister Circuits that section 16913(d) of SORNA is a valid delegation of authority because Congress provided the Attorney General with an intelligible principle to follow." (footnote omitted) (collecting cases)); *Parks*, 698 F.3d at 8 ("All other circuits that have addressed the issue [as to SORNA] have rejected the delegation objection, which modern case law tends regularly to disfavor."); *cf. United States v. Dixon*, 551 F.3d 578, 583–84 (7th Cir.2008) ("Likewise without merit is his argument that for Congress to delegate to an official of the executive branch the authority to fill out the contours of a statute violates the separation of powers. It is commonplace and constitutional for Congress to delegate to executive agencies the fleshing out of criminal statutes by means of regulations."), *rev'd on other grounds sub nom., Carr v. United States*, 560 U.S. 438, 130 S.Ct. 2229, 176 L.Ed.2d 1152 (2010).

Id. (footnotes omitted).

Third, the Tenth Circuit in a separate case has observed that "§ 16913—SORNA's registration provision—does not violate the ... nondelegation doctrine...." *United States v. Carel*, 668 F.3d 1211, 1214 (10th Cir. 2011).

As the court expressly noted in *Rickett*, this language in *Carel* was dicta and thus not

controlling. But while *Rickett* may not be as *automatically* fatal to the defendant's second argument as *Murphy* was to his first, it points to the same result. That is, *Rickett* recognized that (1) the nondelegation doctrine is dead if not buried, (2) that "abundant authority" from other circuits "upholds SORNA in the face of nondelegation challenges," and (3) a prior panel of the Tenth Circuit rejected the argument, albeit in dicta.

Finally, it must be noted that the defendant provides small grounds for supporting his request that the court depart from the"abundant authority" and strike down the application of SORNA based upon a "dead letter" doctrine. Rather, the most the defendant does is to stress that *Rickett* is not technically controlling (Dkt. at 6-7), along with a citation to Justice Scalia's observation in dissent in *Reynolds v. United States*, 132 S.Ct. 975, 986 (2012) (Scalia, J.) (dissenting) that a construction of SORNA which would grant the Attorney General discretion to apply the statute to pre-Act offenders "seems to me sailing close to the wind with regard to the principle that legislative powers are nondelegable."[1] Other than this single statement made in dissent, the defendant offers no authority for his second argument, and the court finds SORNA is constitutional.

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[1] In *Reynolds*, the defendant was a pre-Act offender who challenged the application of SORNA before the Attorney General had effectively implemented any regulations pursuant to 42 U.S.C. § 16928. The Court held that "the Act's registration requirements do not apply to pre-Act offenders *until the Attorney General so specifies*." 132 S.Ct. at 984 (emphasis added). This would be yet another indication that application of SORNA to pre-Act offenders, based on the broad grant of authority under § 16928, is lawful.

IT IS ACCORDINGLY ORDERED this 10th day of November, 2013, that the defendant's Motion to Dismiss (Dkt. 13) is hereby denied.

s/ J. Thomas Marten
J. THOMAS MARTEN, JUDGE

FILED
United States Court of Appeals
Tenth Circuit

April 15, 2015

Elisabeth A. Shumaker
Clerk of Court

PUBLISH

UNITED STATES COURT OF APPEALS

FOR THE TENTH CIRCUIT

UNITED STATES OF AMERICA,

Plaintiff - Appellee,

v.

LESTER RAY NICHOLS,

Defendant - Appellant.

No. 14-3041

ORDER

Before **BRISCOE**, Chief Judge, **KELLY, LUCERO, HARTZ, TYMKOVICH, GORSUCH, HOLMES, MATHESON, BACHARACH, PHILLIPS, MCHUGH**, and **MORITZ**, Circuit Judges.

This matter is before the court on the appellant's *Petition for Rehearing En Banc*. We also have a response from the government. Upon consideration of the implicit request for panel rehearing contained in the petition, the request is denied by a majority of the original panel members.

The en banc petition was also transmitted to all of the judges of the court who are in regular active service. Upon review, a poll was called, and a majority of the active judges voted to deny the en banc suggestion. Consequently, that request is likewise denied. Judges Lucero, Gorsuch, Matheson and Moritz would grant the en banc petition.

Judges Lucero and Gorsuch have written separately in dissent from the denial of the petition.

Entered for the Court

ELISABETH A. SHUMAKER, Clerk

14-3041, United States v. Nichols (Lucero, J., dissenting from the denial of rehearing en banc)

I dissent from the denial of rehearing en banc because a recent Eighth Circuit decision creates a circuit split regarding the applicability of SORNA's notice provisions to offenders who leave the country. Compare United States v. Lunsford, 725 F.3d 859, 860 (8th Cir. 2013), with United States v. Murphy, 664 F.3d 798, 799 (10th Cir. 2011). I continue to hold the view that Murphy was incorrectly decided for the reasons stated in my dissent from that case. See id. at 804-08 (Lucero, J., dissenting). Correcting this circuit split is a matter of exceptional importance given the express purpose of Congress in enacting SORNA to remedy "a wide disparity among State registration requirements and notification obligations for sex offenders." H.R. Rep. No. 109-218(I), at 23 (2005).

The facts of Lunsford and this case illustrate why our current jurisprudence runs directly against the stated intent of Congress. In both cases, the appellants moved directly from the Kansas City metropolitan area to the Philippines. Lunsford had lived in the Missouri side of the metropolis and was not required to update his Missouri registration to reflect his move out of the country. Lunsford, 725 F.3d at 860. But Nichols, who had lived just across the river in Kansas, was brought back to the United States and sentenced to prison for failing to update his Kansas registration. United States v. Nichols, 775 F.3d 1225, 1227 (10th Cir. 2014). We have simply replaced a "wide disparity among State registration requirements" with a wide disparity among Circuit registration requirements. In doing so, we thwart the intent of Congress and needlessly complicate an already complicated law.

Additionally, I agree with Judge Gorsuch that the Constitution demands something more than an "intelligible principle" when Congress delegates its power to define crimes to the executive branch agency charged with prosecuting those crimes. Moreover, I agree that it is questionable whether SORNA even includes an "intelligible principle" to guide the Attorney General's discretion to apply SORNA's provisions to pre-Act offenders. I would address this issue in en banc rehearing as well.

No. 14-3041, *United States v. Nichols*

GORSUCH, Circuit Judge, dissenting from the denial of rehearing en banc.

A circuit split lingers here. First to approach the question, this circuit interpreted 42 U.S.C. § 16913 as requiring sex offenders to notify authorities if they plan to leave the country. *United States v. Murphy*, 664 F.3d 798, 801-02 (10th Cir. 2011). In a later opinion the Eighth Circuit gave thoughtful consideration to this interpretation of the statute but came to the opposite view. *United States v. Lunsford*, 725 F.3d 859, 861-82 (8th Cir. 2013); *see also Murphy*, 664 F.3d at 805 (Lucero, J., dissenting). In denying rehearing today to reconsider this court's position in light of *Lunsford*'s learning, we leave those who seek a resolution of the circuit split to travel other avenues. *Murphy* and *Lunsford* articulate both sides of the split admirably and there's no need for further amplification here, only resolution somewhere.

Beyond this matter of statutory interpretation, though, lies a constitutional question that deserves more notice. If the separation of powers means anything, it must mean that the prosecutor isn't allowed to define the crimes he gets to enforce. Yet, that's precisely the arrangement the Sex Offender Registration and Notification Act purports to allow in this case and a great many more like it. In § 16913(d), Congress left it to the Attorney General to decide whether and on what terms sex offenders convicted before the date of SORNA's enactment should be required to register their location or face another criminal conviction. So unusual is this delegation of legislative authority that to find an analogue you

might have to look back to the time Congress asked the President to devise a code of "fair competition" for the poultry business — a delegation of legislative authority the Supreme Court unanimously rejected and Justice Cardozo called "unconfined and vagrant," a "delegation running riot." *A.L.A. Schechter Poultry Corp. v. United States*, 295 U.S. 495, 551, 553 (1935) (Cardozo, J., concurring). Even then you could be excused for thinking the delegation before us a good deal less cooped or caged than that one. After all, it doesn't just grant some alphabet soup agency the power to write rules about the chicken trade. It invests in the nation's chief prosecutor the authority to devise a criminal code governing a half-million people.

When it comes to sex offenders convicted *after* SORNA's enactment, the statute is exquisitely detailed. It divides those persons into three tiers based on the seriousness of their offense. 42 U.S.C. § 16911. It specifies which sex offenses place offenders in which tiers. *Id.* It requires tier I offenders to register their location for 15 years; tier II offenders to do so for 25 years; and tier III offenders to carry on registering for life. *Id.* § 16915. It explains what conditions merit reducing the registration period. *Id.* § 16915(b)(1). On and on it goes for 22 pages.

But none of this automatically applies to Mr. Lester Nichols and others convicted of sex offenses *before* the Act's passage. Instead, when it comes to past offenders, the Act says just this:

> The Attorney General shall have the authority to specify the applicability of the requirements of this subchapter to sex offenders convicted before the enactment of this chapter . . . and to prescribe rules for registration of any such sex offender. 42 U.S.C. § 16913(d).

Yes, that's it.

As the government acknowledges, this language leaves the Attorney General free to do nothing: the law "does not require the Attorney General to act within a certain time frame or by a date certain; it does not require him to act at all." Brief for the United States at 23-24, *Reynolds v. United States*, 132 S. Ct. 975 (2012) (No. 10-6549). Alternatively, "[u]nder his delegated authority in Subsection (d), the Attorney General could" require all past offenders to register or "require some but not all to register." *Id.* at 24-25. Or, alternatively still, he could require those forced to register to "comply with some but not all of the registration requirements" applicable to future offenders in order to adapt the law as he thinks best for past offenders. *Id.* After all, the statute grants the Attorney General authority to specify the applicability not of the Act as a whole, one way or another, but to specify the applicability of each of the various "requirements" contained within the Act — and Congress well knew the difference. *Compare* 42 U.S.C. § 16912(b) (explaining that the Attorney General shall "interpret and implement this subchapter"), *with id.* § 16913(d) (providing the Attorney General authority "to specify the applicability of the requirements of this subchapter"). Even then, the Attorney General remains free to "change his mind at any given

time or over the course of different administrations." Brief for the United States, *supra*, at 23-24. Given all this, it's perhaps unsurprising how many circuits and commentators have observed that the degree of discretion invested in the Attorney General here is vast.[1] It is so vast, in fact, that some (including the government itself) once suggested a narrower interpretation of § 16913(d) would make more sense of the statute. *See id.*; *Reynolds*, 132 S. Ct. at 986 (Scalia, J., dissenting).

A majority of the Supreme Court, however, carefully considered and rejected any alternative reading and made plain that, as a matter of statutory interpretation, SORNA's retroactive application hinges on the Attorney General. The Court explained that Congress chose this course as its solution for the many "problems" associated with trying "to apply [SORNA's] registration requirements to pre-Act offenders" who were at the time subject to a "patchwork of pre-existing state systems." *Reynolds*, 132 S. Ct. at 981. The power delegated to the

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[1] *See, e.g.*, *United States v. Rickett*, 535 F. App'x 668, 673 (10th Cir. 2013) ("As written, § 16913(d) gives the Attorney General discretion to decide whether and how SORNA should be applied retroactively."); *United States v. DeJarnette*, 741 F.3d 971, 981 (9th Cir. 2013) ("[W]e see no reason to assume that the Attorney General was mandated to apply *all* of SORNA's registration requirements to *all* pre-Act offenders."); *United States v. Johnson*, 632 F.3d 912, 923 (5th Cir. 2011) ("This language is not ambiguous. Following the plain meaning rule, this phrase delegates to the Attorney General the decision of whether and how the SORNA registration requirements apply to offenders with pre-enactment convictions."); *United States v. Madera*, 528 F.3d 852, 858 (11th Cir. 2008) ("Subsection (d) . . . granted the Attorney General unfettered discretion to determine both *how* and *whether* SORNA was to be retroactively applied."); *see also* Steven G. Calabresi & Gary Lawson, *The Rule of Law as a Law of Law*, 90 Notre Dame L. Rev. 483, 485 (2014); Reem Sadik, Comment, *Passing the Torch but Sailing too Close to the Wind*, 6 Legis. & Pol'y Brief 295, 298 (2014).

Attorney General, the Court said, is sort of like a directive telling the Commissioner of Major League Baseball that he has "the authority to specify the applicability" of a stringent minor league drug testing policy to major league players: "we should think that the minor league policy would not apply unless and until the Commissioner so specified" whether and how it should be applied to meet the needs of a similar but different league. *Id.* As written, the statute demonstrates Congress thought that past offenders could "warrant[] different federal registration treatment" than future offenders. *Id.* Even among pre-Act offenders, the statute contemplates the possibility of "different federal registration treatment of different categories of pre-Act offenders." *Id.* In short, Congress thought it a "desirable solution" to ask "the Department of Justice . . . to examine these pre-Act offender problems" and specify "new registration requirements" for them. *Id.*

The Court acknowledged that a statute investing so much authority in the Attorney General inevitably raises with it separation of powers questions. But, the Court said, it would leave those questions for another day. *Id.* Justices Scalia and Ginsburg went further, expressing concern that the law "sail[s] close to the wind." *Id.* at 986 (Scalia, J., dissenting). The day to decide the constitutional question the Court left open is now upon us. And, as it turns out, the statute doesn't just sail close to the wind. It sails right into it.

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Article I § 1 provides that "[a]ll legislative powers herein granted shall be vested in a Congress of the United States." U.S. Const. art. I, § 1. Many times over and in cases stretching back to the founding the Supreme Court has held that this language limits the ability of Congress to delegate its legislative power to the Executive. *See Whitman v. Am. Trucking Ass'ns*, 531 U.S. 457 (2001). There's ample evidence, too, that the framers of the Constitution thought the compartmentalization of legislative power not just a tool of good government or necessary to protect the authority of Congress from encroachment by the Executive but essential to the preservation of the people's liberty. As Madison put it, "[n]o political truth is . . . stamped with the authority of more enlightened patrons of liberty" than the separation of powers because "[t]he accumulation of all powers, legislative, executive, and judiciary in the same hands . . . may justly be pronounced the very definition of tyranny." The Federalist No. 47, at 298 (James Madison) (Clinton Rossiter ed., 1961). By separating the lawmaking and law enforcement functions, the framers sought to thwart the ability of an individual or group to exercise arbitrary or absolute power. And by restricting lawmaking to one branch and forcing any legislation to endure bicameralism and presentment, the framers sought to make the task of lawmaking more arduous still. These structural impediments to lawmaking were no bugs in the system but the point of the design: a deliberate and jealous effort to preserve room for

individual liberty. *See, e.g.*, *Dep't of Transp. v. Ass'n of Am. Railroads*, 135 S. Ct. 1225, 1237 (2015) (Alito, J., concurring) ("The principle that Congress cannot delegate away its vested power exists to protect liberty.").

Without a doubt, the framers' concerns about the delegation of legislative power had a great deal to do with the criminal law. The framers worried that placing the power to legislate, prosecute, and jail in the hands of the Executive would invite the sort of tyranny they experienced at the hands of a whimsical king. Their endorsement of the separation of powers was predicated on the view that "[t]he inefficiency associated with [it] serves a valuable" liberty-preserving "function, and, in the context of criminal law, no other mechanism provides a substitute." Rachel E. Barkow, *Separation of Powers and the Criminal Law*, 58 Stan. L. Rev. 989, 1011-17, 1031 (2006).

So it is that "to abandon openly the nondelegation doctrine [would be] to abandon openly a substantial portion of the foundation of American representative government." Gary Lawson, *Delegation and Original Meaning*, 88 Va. L. Rev. 327, 332 (2002). Neither is it so much that bureaucrats might do a "bad job as our effective legislators" as that "they are neither elected nor reelected, and are controlled only spasmodically by officials who are." John Hart Ely, *Democracy and Distrust* 131 (1980).[2]

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[2] For other excellent works along these and related lines, see Philip Hamburger, *Is Administrative Law Unlawful?* 377 (2014); Bogdan Iancu, *Legislative Delegation: The Erosion of Normative Limits in Modern*

Of course all this invites the question: how do you know an impermissible delegation of legislative authority when you see it? By its own telling, the Court has had a hard time devising a satisfying answer. *See, e.g.*, *Wayman v. Southard*, 23 U.S. (10 Wheat) 1, 42 (1825) ("[T]he precise boundary of this power is a subject of delicate and difficult inquiry. . . ."). But the difficulty of the inquiry doesn't mean it isn't worth the effort. After all, at stake here isn't just the balance of power between the political branches who might be assumed capable of fighting it out among themselves. At stake is the principle that the scope of individual liberty may be reduced only according to the deliberately difficult processes prescribed by the Constitution, a principle that may not be fully vindicated without the intervention of the courts. And "[a]bdication of responsibility is not part of the constitutional design." *Clinton v. City of New York*, 524 U.S. 417, 452 (1998) (Kennedy, J., concurring).[3]

Constitutionalism 222 (2012); Martin Redish, *The Constitution as Political Structure* 16 (1995); David Schoenbrod, *Power Without Responsibility* 181 (1993); Ernest Gellhorn, *Returning to First Principles*, 36 Am. U. L. Rev. 345, 352 (1987); Paul Gewirtz, *The Courts, Congress, and Executive Policy-Making: Notes on Three Doctrines*, 40 Law & Contemp. Probs. 46, 49-65 (1976); Marci A. Hamilton, *Representation and Nondelegation: Back to Basics*, 20 Cardozo L. Rev. 807, 822 (1999); Carl McGowan, *Congress, Court, and Control of Delegated Power*, 77 Colum. L. Rev. 1119, 1127-30 (1977); Bernard Schwartz, *Of Administrators and Philosopher-Kings: The Republic, The Laws, and Delegations of Power*, 72 Nw. U. L. Rev. 443, 457 (1978); Nadine Strossen, *Delegation as a Threat to Liberty*, 20 Cardozo L. Rev. 861, 861 (1999).

[3] *See also, e.g.*, *Ass'n of Am. Railroads*, 135 S. Ct. at 1237 (Alito, J., concurring) ("[T]he inherent difficulty of line-drawing is no excuse for not enforcing the Constitution."); *id.* at 1246 (Thomas, J., concurring in the

Besides, putting the pieces together it turns out we do know a few things.

We know, for example, that Congress can leave "details" to the Executive. Congress can't punt to the President the job of devising a competition code for the chicken industry. *Schechter Poultry*, 295 U.S. at 531. Such widely applicable rules governing private conduct must be enacted by the Legislature. But once Congress enacts a detailed statutory scheme on its own — once it says, for example, that margarine manufacturers must pay a tax and place a stamp on their packages showing the tax has been paid — Congress may leave to the President "details" like designing an appropriate tax stamp. *In re Kollock*, 165 U.S. 526, 533 (1897); *see also, e.g.*, *Currin v. Wallace*, 306 U.S. 1, 15 (1939); *United States v. Shreveport Grain & Elevator Co.*, 287 U.S. 77, 85 (1932).

Of course, defining what qualifies as a detail is itself no detail. But whether or not something fairly denominated a detail is involved, we also know Congress may pass legislation the operation of which is conditioned on a factual finding by the President. So, for example, Congress may direct the President to lift a statutorily imposed trade embargo against Great Britain if he determines as a

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judgment) (explaining that enforcing the separation of powers "is no less important for its difficulty"); Louis L. Jaffe, *An Essay on Delegation of Legislative Power*, 47 Colum. L. Rev. 561, 577 (1947) ("[N]early every doctrine of constitutional limitation has been attacked as vague. Essentially the charges go to the institution of judicial review as we have it rather than specifically to the delegation doctrine."); Antonin Scalia, *A Note on the Benzene Case*, Reg., July-Aug. 1980, at 25, 28 ("So even with all its Frankenstein-like warts, knobs, and (concededly) dangers, the unconstitutional delegation doctrine is worth hewing from the ice.").

factual matter that it is no longer violating the United States's neutrality. *See Cargo of the Brig Aurora v. United States*, 11 U.S. 382, 388 (1813); *see also, e.g., Marshall Field & Co. v. Clark*, 143 U.S. 649, 692-93 (1892). That's clearly no trivial question the President may answer. But answer it he may so long as a clear legislative consequence follows from his factual finding.

While these are the most traditional delegation tests — is it a detail? do we have a clear legislative consequence hinging on a factual finding? — in more recent times the Court has gone further, allowing legislation to stand so long as it contains an "intelligible principle" to guide the exercise of Executive discretion. *J.W Hampton, Jr. & Co. v. United States*, 276 U.S. 394, 409 (1928). How intelligible the "intelligible principle" must be to pass muster is much debated.[4] But we know, by way of example, that Congress may ask the EPA to set national air quality standards which are "requisite to protect the public health" subject to "an adequate margin of safety" because, as used in the statute, the term "requisite" demands a standard neither higher nor lower than necessary to meet

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[4] *See, e.g., Ass'n of Am. Railroads*, 135 S. Ct. at 1246 (Thomas, J., concurring in the judgment); *Mistretta v. United States*, 488 U.S. 361, 415-17 (1989) (Scalia, J., dissenting); David Schoenbrod, *The Delegation Doctrine: Could the Court Give It Substance?*, 83 Mich. L. Rev. 1223, 1224 (1985) ("Since the early part of this century, the Court has said in essence that a statute may be vague so long as it is either not too vague or no vaguer than necessary."); Lawson, *supra*, at 329 (asserting that the Court has "found intelligible principles where less discerning readers find gibberish"); *see also supra* n.2 (additional authorities discussing this question).

the legislatively directed objective of protecting the public health with an adequate margin of safety. *Whitman*, 531 U.S. at 473, 476.

Still, the Court has never expressly held that an intelligible principle alone suffices to save a putative delegation when the criminal law is involved. *See Touby*, 500 U.S. at 165-66. To be sure, the Court has applied the intelligible principle test to regulations that may be enforceable through criminal penalties. *See, e.g.*, *United States v. O'Hagan*, 521 U.S. 642, 695 n.10 (1997); *Yakus v. United States*, 321 U.S. 421, 424-25 (1944). But the Court hasn't endorsed the test in anything like the situation we face — legislation leaving it to the nation's top prosecutor to specify whether and how a federal criminal law should be applied to a class of a half-million individuals. In fact, the Court has repeatedly and long suggested that in the criminal context Congress must provide more "meaningful[]" guidance than an "intelligible principle." *Touby*, 500 U.S. at 166; *Fahey v. Mallonee*, 332 U.S. 245, 249-50 (1947); *see also, e.g.*, *United States v. Robel*, 389 U.S. 258, 272-73 (1967) (Brennan, J., concurring); *Barenblatt v. United States*, 360 U.S. 109, 140 n.7 (1959) (Black, J., dissenting); *cf. United States v. Grimaud*, 220 U.S. 506, 517 (1911); *United States v. Eaton*, 144 U.S. 677, 687-88 (1892).

It's easy enough to see why a stricter rule would apply in the criminal arena. The criminal conviction and sentence represent the ultimate intrusions on personal liberty and carry with them the stigma of the community's collective

condemnation — something quite different than holding someone liable for a money judgment because he turns out to be the lowest cost avoider. *See, e.g.*, Henry M. Hart, Jr., *The Aims of the Criminal Law*, 23 Law & Contemp. Prob. 401, 404 (1958); William J. Stuntz, *Substance, Process, and the Civil-Criminal Line*, 7 J. Contemp. Legal Issues 1, 26 (1996). Indeed, the law routinely demands clearer legislative direction in the criminal context than it does in the civil and it would hardly be odd to think it might do the same here. *See, e.g.*, *Whitman v. United States*, 135 S. Ct. 352, 353 (2014) (Scalia, J., statement respecting the denial of certiorari). When it comes to legislative delegations we've seen, too, that the framers' attention to the separation of powers was driven by a particular concern about individual liberty and even more especially by a fear of endowing one set of hands with the power to create and enforce criminal sanctions. And might not that concern take on special prominence today, in an age when federal law contains so many crimes — and so many created by executive regulation — that scholars no longer try to keep count and actually debate their number? *See* John C. Coffee, Jr., *Does "Unlawful" Mean "Criminal"?: Reflections on the Disappearing Tort/Crime Distinction in American Law*, 71 B.U. L. Rev. 193, 216 (1991) (estimating that over 300,000 federal criminal regulations are on the books).

Recently, the Supreme Court has suggested what a more "meaningful" standard might look like in the criminal context. *See Touby*, 500 U.S. at 166-67.

Its discussion came in the course of a challenge to the Controlled Substances Act — legislation permitting the Attorney General to schedule various drugs as controlled substances, rendering their possession by unauthorized persons illegal. The Court allowed the law to stand, but instead of applying the intelligible principle test alone it proceeded to stress the presence and importance of certain specific statutory features. First, the Court explained, to schedule a drug as a controlled substance the Executive had to find that the drug posed an "imminent hazard" to public safety. *Id.* at 166. Second, when making that determination, the Court noted, the Executive had to consider the drug's "history and current pattern of abuse," "[t]he scope, duration, and significance of abuse," and "[w]hat, if any, risk there is to the public health." *Id.* Third, the law required a further factual finding that the drug in question "has a high potential for abuse," "has no currently accepted medical use in treatment in the United States," and "[t]here is a lack of accepted safety for use of the drug . . . under medical supervision." *Id.* at 167.

Here we see strains of a more traditional delegation jurisprudence, one permitting Congress to enact rules the operation of which is premised on the Executive's factual findings. Indeed, distilling *Touby* to its essence, at least three "meaningful" limitations emerge: (1) Congress must set forth a clear and generally applicable rule (unauthorized persons may not possess the drug) that (2) hinges on a factual determination by the Executive (does the drug pose an

imminent hazard?) and (3) the statute provides criteria the Executive must employ when making its finding (does the drug in question currently have an accepted medical use?). These three criteria could easily be applied to most any delegation challenge in the criminal context and provide the more meaningful standard the Court has long sought. In fact, since *Touby* a number of courts of appeals have employed something very much like them when assessing delegation challenges to federal criminal statutes. *See United States v. Amirnazmi*, 645 F.3d 564, 576-77 (3d Cir. 2011); *United States v. Dhafir*, 461 F.3d 211, 216-17 (2d Cir. 2006); *United States v. Arch Trading Co.*, 987 F.2d 1087, 1093-94 (4th Cir. 1993).

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With that much guidance about delegation doctrine in hand, a few things come clear when we return to the statute before us. For one, it's easy enough to see the similarities between our case and *Schechter Poultry* where the Court held Article I violated. Here as there Congress pointed to a problem that needed fixing and more or less told the Executive to go forth and figure it out. Meanwhile, it's hard to see how ours might be likened to any of the cases turning away delegation challenges.

True, some might try to pass off the question of SORNA's applicability to past offenders as a mere "detail." But the statute before us leaves the Attorney General with "unfettered discretion to determine both *how* and *whether* SORNA [is] to be retroactively applied" to a half-million individuals under threat of

criminal prosecution from his own deputies. *Madera*, 528 F.3d at 858. And however far you want to bend the boundaries of what qualifies as a "detail" it's hard to see how that might qualify. Our case just isn't anything like your grandfather's tax stamp challenge.

Fair enough, some might respond, but sex offenders are so unpopular that there's little chance an Attorney General would do anything other than apply SORNA retroactively to the fullest extent possible. Maybe there is no legislative mandate — conditional or otherwise — requiring him to follow this course, but there might as well be. A reply along these lines seems a likely enough answer to the question what a politically attuned Attorney General would do when the hot potato is passed his way. But it also seems an unlikely answer to the question whether Congress may constitutionally pass the potato in the first place. After all, in a delegation challenge the question isn't whether the Executive is likely to exercise the delegation in one way or another but whether Congress is empowered to delegate the decision at all. *See Whitman*, 531 U.S. at 472-73 ("The very choice of which portion of the power to exercise . . . would *itself* be an exercise of the forbidden legislative authority."). Indeed, the logic at play here would serve to ensconce even the most extreme and obviously unconstitutional delegations only because of a judicial intuition about contemporary political pressures. And not only do unelected judges make for notoriously poor political

pundits: ours is supposed to be an independent judiciary making decisions on the legal merits without respect to the vagaries of shifting political winds.

Others still might claim an "intelligible principle" can be rummaged out of SORNA's preamble — a provision that expresses Congress's wish to "protect the public from sex offenders and offenders against children" by establishing "a comprehensive national system for the registration of those offenders." 42 U.S.C. § 16901. But Supreme Court cases rejecting delegation challenges on intelligible principle grounds don't usually rest on policy objectives voiced in a statute's preamble. *See, e.g.*, *Panama Refining Co. v. Ryan*, 293 U.S. 388, 417-19 (1935) (finding a statute's general policy statement insufficient because the "general outline of policy contains nothing as to the circumstances or conditions in which" the delegation should be exercised, *id.* at 417). To be sure, the Court has sometimes gone so far as to suggest that Congress need only "clearly delineate[] the general policy" to guide an agency's conduct. *Mistretta*, 488 U.S. at 372-73. But this language usually seems to cover situations in which the legislative grant of discretion is tied to specific statutory provisions that expressly direct the exercise of that discretion. *See, e.g.*, *id.* at 375-76 (containing a direct link between discretion and direction); *Yakus*, 321 U.S. at 420-21 (same). Even in *National Broadcasting Co. v. United States*, 319 U.S. 190 (1943), perhaps one of the most ambitious uses of the intelligible principle test, the Court interpreted the statute granting the Executive discretion to regulate radio in the "public interest"

as requiring him to exercise that discretion in ways that "encourage the larger and more effective use of radio." *Id.* at 216. Meanwhile, no comparable guidance exists here for § 16913(d) "specifie[s] no governing standard whatsoever." Calabresi & Lawson, *supra* n.1, at 485.

Requiring a direct statutory link between discretion and direction makes sense too. After all, as the Court has acknowledged in recent years, it is most assuredly wrong to assume that "whatever" seems to further a "statute's primary objective must be the law." *Rodriguez v. United States*, 480 U.S. 522, 526 (1987) (emphasis omitted). Legislation is the art of compromise and few (if any) statutes pursue a single preambulatory purpose without condition, subtlety, or exception. *Id.* at 525-26; *see also United States v. Rentz*, 777 F.3d 1105, 1113 (10th Cir. 2015) (en banc); John F. Manning, *What Divides Textualists from Purposivists?*, 106 Colum. L. Rev. 70, 104 (2006). For precisely these reasons, when it comes to the business of statutory interpretation it is usually the more specific and not the more general or aspirational direction that controls. *See, e.g.*, *Radzanower v. Touche Ross & Co.*, 426 U.S. 148, 153 (1976).

Our case illustrates the point. SORNA's prefatory provision expressing the desire to protect children and create a nationwide registration requirement hardly establishes that the statute meant to do so always and in every particular without exception or at any cost. In fact, SORNA is replete with examples of compromise even when it comes to future offenders. Congress indicated that some future

offenders may be exempt from its registration requirements if they committed certain kinds of sex offenses but not others. 42 U.S.C. § 16911(5)(C), (7)(A), (7)(B), (8). Registration is required for life for some offenders but lesser periods for others. *Id.* § 16915(a). These periods can be reduced on good behavior. *Id.* § 16915(b)(1). In these circumstances, it would seem strange to suppose that the statute's prefatory statement of purpose — or, for that matter, provisions of the law discussing the treatment of future offenders — provides intelligible guidance for the Attorney General's treatment of past offenders. Especially when Congress went on to address past offenders specifically, exempted them from the automatic application of any of the statute's registration requirements, and left their treatment to the Attorney General.

Separately but relatedly, the Supreme Court has instructed that under the intelligible principle test "the degree of agency discretion that is acceptable varies according to the scope of the power congressionally conferred." *Whitman*, 531 U.S. at 475. Faint echos of detail doctrine can be found here: less direction may be required when Congress leaves it to the Executive to define what constitutes a "country elevator[]" and more may be required when Congress seeks to endow the Executive with the power to create regulations that affect the national economy. *Id.* So even assuming that a preamble detached from the provision granting discretion to the Executive might suffice to supply an intelligible principle in some circumstances, it certainly won't always. And once again it's hard to see

how the discretion conferred here is anything less than extraordinary — in its breadth (allowing the Attorney General to apply none, some, or all of SORNA's requirements to none, some, or all past offenders), in its subject matter (effectively defining a new crime), in its chosen delegate (the nation's top prosecutor), and in the number of people affected (half a million). All factors suggesting more, not less, guidance is required.

Neither is it any answer to say that, though the Attorney General wants for any intelligible principle to guide him in deciding which requirements to impose on which past offenders, at least his discretion finds some boundaries in the statute (he cannot exceed the full application of all of SORNA's requirements). Delegation doctrine teaches that Congress must set *both* the "boundaries" of the Executive's discretion *and* supply an "intelligible principle" for the exercise of that discretion within those boundaries. *Mistretta*, 488 U.S. at 372-73. After all and again, the point of the delegation doctrine isn't so much that some poor Executive agent tasked with the thankless job will necessarily perform poorly within the bounds and metes of the discretion set for him. It is that decoupling the exercise of his discretion so much from legislative direction deprives the people of the structural protections guaranteed by the first section of the first article of the Constitution.

There remains much less room still for debate about the proper outcome of this case when the "intelligible principle" test gives way to a more "meaningful" one in the criminal setting. After all, SORNA's delegation contains none of the three factors that *Touby* found reassuring and that circuit courts have since used to assess delegation challenges in the criminal context. First, the statute provides no generally applicable rule for past offenders for the Attorney General to follow contingent only on specified factual findings. Rather, the Attorney General may apply all, some or none of the requirements of the Act however he sees fit. Second, the statute requires no factual findings of the Attorney General of any kind. Third, it offers no guidance about these non-existent factual findings.

To be sure, Congress could have easily written a statute with such constraints, and to remedy the delegation problem here it might still. For example, Congress could have tasked the Attorney General with the job of determining what factors correlate with recidivism or present an unreasonable danger to the public and make his determinations based on those considerations. When deciding which past offenders should be required to register Congress could have required the Attorney General to examine, as well, factors like the recency of the violation; the nature of the sex offense; the number of past violations; the offender's age, family, residential, or occupational circumstances; or the offender's mental or physical health — or banned consideration of any of these factors. It's easy to imagine all sorts of ways Congress might have

constrained — and might still constrain — the Attorney General's discretion in ways parallel to *Touby*. But and by the government's own admission, we have nothing of the kind here. And that leaves us well outside the ballpark when it comes to satisfying *Touby*'s test. Indeed, you might wonder if we are even on Yawkey Way. *See* Sadik, *supra* n.1, at 298 (arguing that SORNA fails *Touby*'s test).

Delegation doctrine may not be the easiest to tease out and it has been some time since the Court has held a statute to cross the line. But it has also been some time since the courts have encountered a statute like this one — one that, if allowed to stand, would require the Judiciary to endorse the notion that Congress may effectively pass off to the prosecutor the job of defining the very crime he is responsible for enforcing. By any plausible measure we might apply that is a delegation run riot, a result inimical to the people's liberty and our constitutional design.

United States Code Annotated
Title 42. The Public Health and Welfare
Chapter 151. Child Protection and Safety
Subchapter I. Sex Offender Registration and Notification
Part A. Sex Offender Registration and Notification

42 U.S.C.A. § 16911

§ 16911. Relevant definitions, including Amie Zyla expansion of sex offender definition and expanded inclusion of child predators

Effective: July 27, 2006
Currentness

In this subchapter the following definitions apply:

(1) Sex offender

The term "sex offender" means an individual who was convicted of a sex offense.

(2) Tier I sex offender

The term "tier I sex offender" means a sex offender other than a tier II or tier III sex offender.

(3) Tier II sex offender

The term "tier II sex offender" means a sex offender other than a tier III sex offender whose offense is punishable by imprisonment for more than 1 year and--

(A) is comparable to or more severe than the following offenses, when committed against a minor, or an attempt or conspiracy to commit such an offense against a minor:

(i) sex trafficking (as described in section 1591 of Title 18);

(ii) coercion and enticement (as described in section 2422(b) of Title 18);

(iii) transportation with intent to engage in criminal sexual activity (as described in section 2423(a))[1] of Title 18;

(iv) abusive sexual contact (as described in section 2244 of Title 18);

(B) involves--

(i) use of a minor in a sexual performance;

(ii) solicitation of a minor to practice prostitution; or

(iii) production or distribution of child pornography; or

(C) occurs after the offender becomes a tier I sex offender.

(4) Tier III sex offender

The term "tier III sex offender" means a sex offender whose offense is punishable by imprisonment for more than 1 year and--

(A) is comparable to or more severe than the following offenses, or an attempt or conspiracy to commit such an offense:

(i) aggravated sexual abuse or sexual abuse (as described in sections 2241 and 2242 of Title 18); or

(ii) abusive sexual contact (as described in section 2244 of Title 18) against a minor who has not attained the age of 13 years;

(B) involves kidnapping of a minor (unless committed by a parent or guardian); or

(C) occurs after the offender becomes a tier II sex offender.

(5) Amie Zyla expansion of sex offense definition

(A) Generally

Except as limited by subparagraph (B) or (C), the term " sex offense" means--

(i) a criminal offense that has an element involving a sexual act or sexual contact with another;

(ii) a criminal offense that is a specified offense against a minor;

(iii) a Federal offense (including an offense prosecuted under section 1152 or 1153 of Title 18) under section 1591, or chapter 109A, 110 (other than section 2257, 2257A, or 2258), or 117, of Title 18;

(iv) a military offense specified by the Secretary of Defense under section 115(a)(8)(C)(i) of Public Law 105-119 (10 U.S.C. 951 note); or

(v) an attempt or conspiracy to commit an offense described in clauses (i) through (iv).

(B) Foreign convictions

A foreign conviction is not a sex offense for the purposes of this subchapter if it was not obtained with sufficient safeguards for fundamental fairness and due process for the accused under guidelines or regulations established under section 16912 of this title.

(C) Offenses involving consensual sexual conduct

An offense involving consensual sexual conduct is not a sex offense for the purposes of this subchapter if the victim was an adult, unless the adult was under the custodial authority of the offender at the time of the offense, or if the victim was at least 13 years old and the offender was not more than 4 years older than the victim.

(6) Criminal offense

The term "criminal offense" means a State, local, tribal, foreign, or military offense (to the extent specified by the Secretary of Defense under section 115(a)(8)(C)(i) of Public Law 105-119 (10 U.S.C. 951 note)) or other criminal offense.

(7) Expansion of definition of "specified offense against a minor" to include all offenses by child predators

The term "specified offense against a minor" means an offense against a minor that involves any of the following:

(A) An offense (unless committed by a parent or guardian) involving kidnapping.

(B) An offense (unless committed by a parent or guardian) involving false imprisonment.

(C) Solicitation to engage in sexual conduct.

(D) Use in a sexual performance.

(E) Solicitation to practice prostitution.

(F) Video voyeurism as described in section 1801 of Title 18.

(G) Possession, production, or distribution of child pornography.

(H) Criminal sexual conduct involving a minor, or the use of the Internet to facilitate or attempt such conduct.

(I) Any conduct that by its nature is a sex offense against a minor.

(8) Convicted as including certain juvenile adjudications

The term "convicted" or a variant thereof, used with respect to a sex offense, includes adjudicated delinquent as a juvenile for that offense, but only if the offender is 14 years of age or older at the time of the offense and the offense adjudicated was comparable to or more severe than aggravated sexual abuse (as described in section 2241 of Title 18), or was an attempt or conspiracy to commit such an offense.

(9) Sex offender registry

The term "sex offender registry" means a registry of sex offenders, and a notification program, maintained by a jurisdiction.

(10) Jurisdiction

The term "jurisdiction" means any of the following:

(A) A State.

(B) The District of Columbia.

(C) The Commonwealth of Puerto Rico.

(D) Guam.

(E) American Samoa.

(F) The Northern Mariana Islands.

(G) The United States Virgin Islands.

(H) To the extent provided and subject to the requirements of section 16927 of this title, a federally recognized Indian tribe.

(11) Student

The term "student" means an individual who enrolls in or attends an educational institution, including (whether public or private) a secondary school, trade or professional school, and institution of higher education.

(12) Employee

The term "employee" includes an individual who is self-employed or works for any other entity, whether compensated or not.

(13) Resides

The term "resides" means, with respect to an individual, the location of the individual's home or other place where the individual habitually lives.

(14) Minor

The term "minor" means an individual who has not attained the age of 18 years.

CREDIT(S)

(Pub.L. 109-248, Title I, § 111, July 27, 2006, 120 Stat. 591.)

Notes of Decisions (46)

Footnotes

1 So in original. The second closing parenthesis probably should follow "18".

42 U.S.C.A. § 16911, 42 USCA § 16911

Current through P.L. 114-25 (excluding P.L. 114-18) approved 6-15-2015

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United States Code Annotated
Title 42. The Public Health and Welfare
Chapter 151. Child Protection and Safety
Subchapter I. Sex Offender Registration and Notification
Part A. Sex Offender Registration and Notification

42 U.S.C.A. § 16913

§ 16913. Registry requirements for sex offenders

Effective: July 27, 2006
Currentness

(a) In general

A sex offender shall register, and keep the registration current, in each jurisdiction where the offender resides, where the offender is an employee, and where the offender is a student. For initial registration purposes only, a sex offender shall also register in the jurisdiction in which convicted if such jurisdiction is different from the jurisdiction of residence.

(b) Initial registration

The sex offender shall initially register--

(1) before completing a sentence of imprisonment with respect to the offense giving rise to the registration requirement; or

(2) not later than 3 business days after being sentenced for that offense, if the sex offender is not sentenced to a term of imprisonment.

(c) Keeping the registration current

A sex offender shall, not later than 3 business days after each change of name, residence, employment, or student status, appear in person in at least 1 jurisdiction involved pursuant to subsection (a) of this section and inform that jurisdiction of all changes in the information required for that offender in the sex offender registry. That jurisdiction shall immediately provide that information to all other jurisdictions in which the offender is required to register.

(d) Initial registration of sex offenders unable to comply with subsection (b) of this section

The Attorney General shall have the authority to specify the applicability of the requirements of this subchapter to sex offenders convicted before the enactment of this chapter or its implementation in a particular jurisdiction, and to prescribe rules for the registration of any such sex offenders and for other categories of sex offenders who are unable to comply with subsection (b) of this section.

(e) State penalty for failure to comply

Next

Each jurisdiction, other than a Federally recognized Indian tribe, shall provide a criminal penalty that includes a maximum term of imprisonment that is greater than 1 year for the failure of a sex offender to comply with the requirements of this subchapter.

CREDIT(S)

(Pub.L. 109-248, Title I, § 113, July 27, 2006, 120 Stat. 593.)

Notes of Decisions (189)

42 U.S.C.A. § 16913, 42 USCA § 16913
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Code of Federal Regulations
Title 28. Judicial Administration
Chapter I. Department of Justice
Part 72. Sex Offender Registration and Notification (Refs & Annos)

28 C.F.R. § 72.3

§ 72.3 Applicability of the Sex Offender Registration and Notification Act.

Effective: May 1, 2011
Currentness

The requirements of the Sex Offender Registration and Notification Act apply to all sex offenders, including sex offenders convicted of the offense for which registration is required prior to the enactment of that Act.

Example 1. A sex offender is federally convicted of aggravated sexual abuse under 18 U.S.C. 2241 in 1990 and is released following imprisonment in 2007. The sex offender is subject to the requirements of the Sex Offender Registration and Notification Act and could be held criminally liable under 18 U.S.C. 2250 for failing to register or keep the registration current in any jurisdiction in which the sex offender resides, is an employee, or is a student.

Example 2. A sex offender is convicted by a state jurisdiction in 1997 for molesting a child and is released following imprisonment in 2000. The sex offender initially registers as required but relocates to another state in 2009 and fails to register in the new state of residence. The sex offender has violated the requirement under the Sex Offender Registration and Notification Act to register in any jurisdiction in which he resides, and could be held criminally liable under 18 U.S.C. 2250 for the violation because he traveled in interstate commerce.

Credits
[Order No. 3239–2010, 75 FR 81853, Dec. 29, 2010]

SOURCE: Order No. 2868–2007, 72 FR 8897, Feb. 28, 2007, unless otherwise noted.

AUTHORITY: Pub.L. 109–248, 120 Stat. 587.

Notes of Decisions (34)

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